U.S. DEPARTMENT OF COMMERCE
National Technical Information Service

PB-281 710

Transcript of National Commission on New Technological Uses of Copyrighted Works Meeting Number 21 Held at Washington D.C. on April 20-21, 1978

National Commission on New Technological Uses of

Copyrighted Works, Washington, D.C.

Apr 78

BIBLIOGRAPHIC DATA SHEET	1. Report No. CONTU 78-004	2.	PB 281 710

4. Title and Subtitle Transcript of CONTU Meeting Number Twenty-One	5. Report Date April, 1978 6.
7. Author(s) National Commission on New Technological Uses of Copyrighted Works (CONTU)	8. Performing Organization Rept. No.
9. Performing Organization Name and Address National Commission on New Technological Uses of Copyrighted Works (CONTU) Washington, D. C. 20558	10. Project/Task/Work Unit No. Public Law 93-573 11. Contract/Grant No.
12. Sponsoring Organization Name and Address Same as Box 9	13. Type of Report & Period Covered transcript of meeting held 4/20-21/78 14.

15. Supplementary Notes

16. Abstracts

Transcript of a Commission meeting held in the Wilson Room, Library of Congress, on April 20 and 21, 1978. On the first day of the meeting, testimony on the Draft of the Photocopy Subcommittee was presented by the following individuals: Douglas S. Price (National Commission on Libraries and Information Science); Paul G. Zurkowski (Information Industry Association); Robert Frawley (Pharmaceutical Manufacturers' Association); Frank E. McKenna and others (Council of National Library Associations); and Charles Lieb (Association of American Publishers). On the second day of the meeting the Reports of the New Works and Software Subcommittees were discussed. The majority of the Commissioners voted to accept the Report of the Software Subcommittee.

17. Key Words and Document Analysis. 17a. Descriptors

Libraries
Photocopying
Journals
Copyright
Computers
Data bases
Computer software
New works
CONTU
Computer programs

17b. Identifiers/Open-Ended Terms

17c. COSATI Field/Group

18. Availability Statement	19. Security Class (This Report)	
Release Unlimited	UNCLASSIFIED	
	20. Security Class (This Page) UNCLASSIFIED	22. Price A10-A01

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NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS

Twenty-first Meeting

Wilson Room
Library of Congress
Washington, D.C.

April 20-21, 1978

Thursday, April 20, 1978
10:30 o'clock a.m.

Commissioners Present:

Judge Stanley H. Fuld, Chairman
Dr. Melville B. Nimmer, Vice Chairman
Mr. George D. Cary
Mr. John Hersey
Mr. Dan Lacy
Dr. Arthur R. Miller
Mr. Robert Wedgeworth
Ms. Alice E. Wilcox
Mr. Edmund L. Applebaum, for the
Librarian of Congress
Ms. Barbara A. Ringer,
Register of Copyrights

Staff Present:

Arthur J. Levine, Executive Director
Robert W. Frase, Assistant Executive Director/Economist
Michael S. Keplinger, Assistant Executive Director
Jeffrey L. Squires, Staff Attorney
Christopher A. Meyer, Policy Analyst
Patricia T. Barber, Librarian Analyst
Dolores K. Dougherty, Administrative Officer

C O N T E N T S

P R O C E E D I N G S

CHAIRMAN FULD: I call to order the 21st meeting of the Commission. I welcome you, ladies and gentlemen, to it. This is the first meeting of the Commission since our colleague, Commissioner William S. Dix, died on February 22nd at the age of 67. I take this opportunity to express publicly the high regard in which Dr. Dix was held by his fellow Commissioners.

He was a most active member of the Commission and brought to its deliberations a searching intelligence and a vast and varied experience. He will be sorely missed.

Dr. Dix's service with the Commission from October, 1975 was only one of his many important contributions to the public and intellectual life of this country. He was Librarian of Princeton University from 1953 until his retirement in 1975. He served terms as the President of the American Library Association from 1969 through '70; Chairman of the Association of Research Libraries in 1962; and Chairman of the United States National Commission on UNESCO from 1959 through 1961.

This Commission shares the views of Deputy Librarian of Congress, William J. Welch, who said of Dr. Dix, and I quote: "We have lost the most effective spokesman for libraries and their publics in our time. But the benefits of his wise counsel will forever enrich the

world of learning. We are comforted by the memories of a personal relationship with a remarkably gentle man."

The Commission extends its condolences to his wife, Jane, and their three children.

We are going to hear remarks concerning the draft report of our photocopy subcommittee. Mr. Douglas Price, Deputy Director of the National Commission on Libraries and Information Science, has attended many CONTU meetings. However, this is the first time he has appeared as a witness.

Mr. Price, we are delighted to welcome you in that capacity.

MR. PRICE: Thank you, Judge Fuld.

I want to apologize for the paucity of copies of my statement. My photocopy machine chose this morning to not work properly, and it was a question of getting here with 25 copies and on time or with 50 copies and not getting here. A member of my staff should be here before the morning is out with additional copies for the observers.

The National Commission on Libraries and Information Science welcomes the opportunity to offer its comments on the draft report of the Subcommittee on Photocopying. Our comments are few, and only two of them will require extensive discussion. So, I will address the brief ones first.

This, by the way, is in the statement.

In Table II, referring to your draft report--in

Table II on page 17 of the draft report and the discussion on pages 16 and 18, the use of the 1.93 million figure in column 3 implies that all of the copies over five years old may require authorization. If you check with the King report, that's all copies over five years old, what it takes to get to the 1.93. This would be a more stringent set of rules for the older material than for the more recent material, and we feel sure that it is not the intent of Congress that "aggregate quantities" be interpreted more stringently for older material than for current material.

On the other hand, we would like to point out that in the discussion of "intrasystem" usage, the paragraph beginning on the bottom of page 22--as it is presently written--has a potential for encouraging abuse of photocopying. I have no doubt that following witnesses will speak to this point in some detail. Note that we do not disagree with the interpretation of "intrasystem" as presented, that intra-system is intralibrary, de facto, de jure, by simply separate parts of the same organization. But if the statement as it is written now is taken out of context--and it will be--it could be very misleading.

Two other quick points before I get into the more substantive issues. On page 94 you suggest that NCLIS and the Register of Copyright might bring together a group to develop standard language for granting copying permission

beyond that allowed by the 1976 act. NCLIS will be glad to cooperate in such a venture, if there is sufficient interest in the community and sufficient application to justify the expense. With regard to the suggestion on page 96 that the Library of Congress, the Copyright Office, and NCLIS explore with interested parties the inclusion of copyright data in the CONSER record, we are willing to participate, anxious to, if there is again sufficient interest, but would caution all that such an inclusion would be a very expensive process. And a careful cost/benefit analysis would have to be the first step.

On the more substantive issues, I would first like to address the table on page 65, the discussion of the public library copying, and the observations on page 66 with respect to the King report. We feel quite strongly that there is no justification for ascribing the apparent discrepancy in the public library figures to--and I quote--"something basically erroneous in the estimates prepared from the samples in the King study," unquote. At our request, King Research did an analysis of the public libraries in their sample. And the results of this analysis, along with their transmittal letter, are attached to this statement. When you examine it, you will note that none of the libraries approaches a 30 percent payments-to-periodicals-budget ratio. And only six of them exceed 10 percent.

Mr. King warns carefully that these are of course individual libraries, and you've got to be careful about drawing large conclusions. But they are indications.

As is stated in the draft report, the 30 percent ratio "does not seem in accord with common sense." If you examine the source of the periodicals budget figure used in arriving at that figure, you will find that there are some other items which seem to violate common sense. I am referring to Table 17 of the LIBGIS I report, a copy of which is attached to the statement. In that the periodicals budgets of all the public libraries in the United States are less than 9 percent of the total budget for books and periodicals taken together; and it is precisely equal to the sum of the expenditures for microforms in audiovisual materials. I doubt if you would find any librarian, public or otherwise, who would accept those as common sense figures.

I discussed these figures with the National Center for Education Statistics, the Library Surveys Branch, and was told that in fact Table 17 was constructed manually, after the contractor had completed his work, by applying the percentages in Table 18, which follows, to the total dollar expenditures shown in column 3 of Table 20. Both of those are also attached to the statement. You will note that the percentages are shown only to one decimal point, and this accounts for substantial errors in Figure 17, including the

failure of individual entries to add up to the total. Aside from this error, which is relatively minor--it would not account for the discrepancy--NCES agrees that the figure for the total periodicals budget is too low, but they are not willing to speculate on how low. Fortunately, there appears to be a way to resolve the question fairly quickly, and we would suggest that it be done. For our National Inventory of Library Needs-1975, we obtained for our contractor, Boyd Ladd, the LIBGIS I magnetic tape file with the basic library data. We have discussed the possibility of using this tape to produce a national total periodicals budget figure--as a matter of fact, that total top line in Table 17 accurately picked up. We have discussed this with CONTU staff, and we have asked Ladd and King to prepare a cost estimate to do this work. It should not be much, a few thousand dollars at the most. And the results of this analysis should provide a definite answer to the question. I think this responds to the request for analytical response to your question. We will try to do this for you--with you.

Finally, I would like to offer some clarification of the discussion of the National Periodicals System, call your attention to what we feel is an inconsistency in approach, and register a protest. The clarification we want to offer is on the role of the National Periodicals Center as a part of the total system. The discussion in the subcommittee report,

after listing the three levels of the system and giving passing mention to the roles of Levels 1 and 3, discusses the Center as if it were an independent entity. It is not intended to be anything other than a part of the total system--a "black box," if you will--which is inserted into the system to improve its efficiency. It is not, by any stretch of the imagination, intended to be an American version of the British Library Lending Division. I should like to try to put into perspective how the total system is expected to operate.

In the first place, our task force report, having been prepared largely by librarians for librarians, fails to emphasize one very significant aspect. While it speaks of Level 2 as a backup to Level 1, and Level 3 as backup to Level 2, it fails to point out that the whole concept of interlibrary loan is backup to the individual library, which is expected to have a collection which will satisfy most of its users' needs right on the spot, or at least within the local system. The King report shows that this is in fact the case, with some 88 percent of the photocopies of periodical articles being made for local users. The whole system we are discussing then is dealing with only 12 percent of the total volume of photocopies; and of that, 80 percent will be filled by existing state and regional centers. And five to eight percent of the very rare material, very seldom-used material,

by existing national libraries and research collections. This leaves approximately 12 to 15 percent of the interlibrary loans which will be filled by the Center. And the others, that acts as a switching center.

At the volumes estimated in the King report, that is fewer than one million photocopies out of 48 million, barely two percent. The system, when it is in full operation, will improve the effectiveness of the interlibrary loan system by providing hierarchical channels for requests. No longer will the large research libraries be overburdened with requests simply because they are large and well known. Each library will have a state or regional center to which it will direct its requests. That center in turn, when it cannot fill the request, will forward it to the National Center, which again in turn will fill or forward, not at random but in a precisely focused fashion, to an institution which is known to possess the particular material. The Center could not function without the hierarchical system, nor the system without the Center.

The point, of course, is that the National Periodicals Center is not a stand-alone entity but an integral part of a system, most of which is already in place.

The inconsistency, we want to point out, lies in the fact that Section VIII.C recommends a change to the law to give commercial copiers some claim to fair use on the part of

their clients, while Section III.D denies both fair use and Section 108 benefits to the proposed non-profit National Periodicals Center. We must ask why you propose to deny the user of the public or academic library privileges which you wish to give customers of the commercial copier.

Therein lies the root of our protest. While the report acknowledges the vast uncertainties surrounding the establishment of the Center, its design, its start-up schedule, its modus operandi, et cetera, the report states on page 42 that it, quote, "would be required to secure authorization," end quote, and on page 45 that it, quote, "is probably not entitled to the benefits of Section 108," end quote. The Commission disagrees strongly with both of these statements, but it is not my purpose this morning to obtain a reversal. The question will not, cannot, be settled here and now. All we are asking is that the question be left open until the facts are in and at least some of the uncertainties are eliminated.

As it is now written, Section III.C will have the effect of closing off debate. No matter how they are qualified or hedged, the two statements cited will rise again and again to block attempts to achieve a reasonable accommodation. We ask that they be deleted and that the related discussion be restructured in the subjunctive. A discussion preceded by "if it were required to secure authorization" or

"if it were not entitled to the benefits of Section 108" would be much less likely to become a serious impediment to future development and discussion.

That concludes the formal statement, gentlemen. I will provide expansion or answer any questions that any of you may have.

CHAIRMAN FULD: Professor Nimmer.

VICE CHAIRMAN NIMMER: Mr. Price, I want to relook at this language on whether fair use is or is not applicable. I don't think we intended to state absolutely it is not applicable but only to suggest that by and large it might not be applicable. But that to one aside because I want to look at that material again.

But on 108 is it your position that under existing law 108 is applicable?

MR. PRICE: Our position is that it is an open question still. You speak in terms of, for instance, that the National Center would not be a library. You cite as a definition of library--when I say you, I mean the subcommittee, please--a collection of books and similar material organized and administered for reading and consultation and study from the ALA glossary of library terms. I don't know when that was written, and it may have been appropriate 25 or 30 years ago. But I hardly think it applies very accurately to the film library of the American Film Institute, the television

archives of Vanderbilt University. Neither of these are similar material to books. Nor can they be read, consulted, and studied without other equipment. And they can be read remotely or sent remotely--and frequently are--in both cases. Whether it's a library archives, it's a part of the system and a relatively small part in terms of the volume of its production, if you will.

We are not saying that the National Center would never have to pay anybody any royalties under any circumstances. But at the same time your statement on page 42, if you will, in the middle of the page--"Taking these factors into consideration, it would seem to the subcommittee that the non-profit center established for the specific purpose of providing copies would be required to secure authorization from copyright owners to make and distribute full-scale copies of periodical articles from the original issues as well as to make microform copies"--this doesn't qualify. It doesn't say sometimes.

This is the point. We just feel that the statements, as they appear in here--and it is not a question of intent on the part of the subcommittee. It is what is going to be read into it. As I pointed out with reference to the other statement--and you well know that statements get pulled out of context. I heard about four of them on Tuesday, four or five pieces pulled out of context by opposing people. I mean,

pulled out of context to prove that they were right and prove the other one was wrong, and this will happen. And it's a barrier. We just want to leave the question open for discussion. Obviously the National Periodicals System cannot function without the cooperation of the libraries, the cooperation of the publishers. It's going to have to be a mutual thing. So, obviously we are going to have to reach an accommodation. However, we do feel that these statements will impede reaching that accommodation as they are stated now.

CHAIRMAN FULD: Mr. Wedgeworth.

COMMISSIONER WEDGEWORTH: For purposes of clarification, I believe I hear you say directly that the subcommittee and indeed the entire Commission ought to take a look at several classes of institutions or organizations that either are or will be providing copies of materials, copyrighted materials, to the public--the proposed National Periodicals Center, the commercial copying organizations, which presently operate frequently on the fringes of academic campuses, some of the agencies of the Federal Government that provide certain services. And you are saying perhaps we ought to take a look at all of these together because in looking at them separately we may have denied some rights to certain classes of institutions that we have asserted are available to others.

MR. PRICE: I think this is true, yes. Again it's a systems question.

COMMISSIONER WEDGEWORTH: Not so much just within the library system but--

MR. PRICE: No.

COMMISSIONER WEDGEWORTH: There are other kinds of organizations that might spring up somewhat differently from the National Periodicals Center. And the question would be, What would be that organization's rights to provide copies of videocassette tapes or other kinds of materials under similar terms and conditions?

MR. PRICE: But we are dealing here with photocopies. I think perhaps if I said ecology, there are systems for obtaining copies of periodical articles, which do include libraries, commercial photocopiers, licensed, unlicensed and what have you. And you need to look at it as a totality. It would be hoped that the National Periodicals Center would rationalize--national periodicals system which we propose, with a center in its midst--would rationalize the system, improve its efficiency, both in terms of speed and reduction of cost.

I suspect that a good bit of the cost of handling interlibrary loans is searching for things that the library does not have that they have been asked for. I suspect that a good bit of the burden of interlibrary loans placed on places like Harvard, Yale, and Columbia is from stuff that is widely held, but they send it there because they know they've

got it; whereas, if we had this hierarchical system, it would be focused. And the research libraries would be down to the stuff that they only have. And if like three of them had it and we got three requests, they might conceivably be one to each. It's a question of improving the system for everybody. That's what we're looking for.

CHAIRMAN FULD: Mr. Hersey.

COMMISSIONER HERSEY: Mr. Price, you assert at one point that the interpretation of intrasystem as it's set forth here will be taken out of context. Would you elaborate on that and say how you think it will be.

MR. PRICE: Let's see, I think we found that on page--

COMMISSIONER HERSEY: Twenty-two.

MR. PRICE: Twenty-two. It assumed that a large city central or headquarters library and its numerous branches constitute one library, and therefore any library patron in that city may go to the headquarters or any branch to secure a single copy of an article, under Subsection 108(d) from any periodical subscribed to by any library unit in that city." I can conceive--as a matter of fact, it has been suggested and I've heard it suggested, that that means that the Chicago Public Library System or the Montgomery County Public Library System, to get a little bit closer to home, need only subscribe to one copy of any periodical, and it can then

provide on request anything to anybody in the county with photocopy. I don't think that's the subcommittee's intent. You're talking here about interlibrary loan, and it's quite clear in the context what you're talking about. But you yank that statement out of context--as I say, it will and has been so yanked--and people will say, "Well, gee, here's a license to steal," and I use that word advisedly.

CHAIRMAN FULD: Are there any other questions?

COMMISSIONER WEDGEWORTH: Yes, one other question. Is it the position of the National Commission that 107 rights should be extended to users of the proposed National Periodicals Center in the way that is suggested for users of commercial copying organizations in the draft subcommittee report?

MR. PRICE: If the latter, then certainly the former. It's an open question. We are not at this point taking a position. Personal opinion? If you're going to do the latter, you've got to do the former. In other words, if you give it to the commercial user of a commercial copier, fair use, then you have to give it to the user of a public or academic or other kinds of library - who accesses the National Center. It strikes me as being grossly unfair.

On the other hand, I agree that I think there is a fair use component for the user. And again we've got to go back to this question of, What is the whole purpose of this thing? What is the purpose of the library system? What is

the purpose of the publication of journal articles? It's for users to use this material, to provide access to this information. And they're the people that we've got to take care of now while recognizing the rights of the producers and the economic rules of survival.

I would say again, if you go one way, the fair use resides with the user, which I assume is the basis for the modification proposed for the commercial copying. Then the fair use resides with the user of the periodicals center too. I think it is just a question of logic.

CHAIRMAN FULD: Are there any other questions?

Thank you very much.

Our second witness holds the record for the number of appearances as a CONTU witness. This is the fifth time that we've been privileged to introduce Paul Zurkowski, President of the Information Industry Association.

We are happy to hear you again, Mr. Zurkowski.

MR. ZURKOWSKI: Thank you, Mr. Chairman.

I would like to compare statistics. I have restrained myself on previous occasions from asking for an opportunity so as to avoid that record. But I guess I got it nonetheless.

We have submitted to you a statement, and I have provided for the record a copy of our new directory, which lists our 130 members, in case there is any question as to

who they are. Two recent additions to the membership are of significance I think. CBS has joined, and the company that markets the View Data System in the United States has joined, which has tremendous implications for the material before us today.

Our Proprietary Rights Committee met, and we kind of stood back from the report to assess some of its features and segments, and decided that there were two major aspects of it that we would like to comment to you on today. We have some sub-comments to that, and it may get a little confusing. But we'll try to stick to the two major themes.

The first aspect arose out of a discussion within the committee on the question, Just what is the interest of the information industry--or interests of the information industry--in this report. The committee discussion led to a consensus that while the report addresses the photocopy relationship between producers and distributors of journal and other inkprint materials, it does not address photocopying in the larger context of the total information marketplace. And just as a footnote there, the footnote on page 1 of the report which relates to microfilm I think overstates the photocopying of materials to include language--the language which states in the footnote, "including reproduction of microform from full scale copies." I really think that is a manufacturing process, and it may have some implications beyond

the bounds of the photocopying report.

But, going back to the statement, by omitting consideration of certain relationships between producers, distributors, and retailers, the report suggests several interpretations of the current situation which we feel will prejudice the healthy growth and development of the complete information structure needed by this country.

This, in turn, will adversely affect the ability of the public to gain access to copyrighted works in ways and on terms suited to their individual preferences.

Information in its myriad forms is gradually being recognized and dealt with as an economic good. For many segments of our population, such treatment simplifies, regularizes and facilitates its effective production, distribution, retailing, and accessibility. Your authorization clearly reaches consideration of the total information apparatus by which the public gains access to copyrighted materials.

The new law provides the rules governing the relationship, and as such they deserve treatment in the report. The report makes a good start in this direction in its discussion of the competitive effective of the National Periodicals Center on other segments of the community. Certainly its discussion of the relationship of library photocopying and the economics of journal publishing is of

critical importance. We feel there are equally important other relationships needing similar treatment.

We were impressed with the recognition the report gave to the impact the pricing scale of the National Periodicals Center would have, particularly if it created a monopolistic position for the Center and regardless of what the level of photocopying is today among libraries if such a situation arises. The past experience of photocopying may not be a good guide to assess what the future photocopying will be. So that these recommendations and these developments are likely to transform how people obtain copies. And our point is that the full range of activities that are involved in the marketplace need to be carefully considered.

There's only one point about the monopoly besides the economics of it. No single source can hope to serve the infinite variety of "cognition screens" to be found in society. If you see something, you will read something, you will see in it things that I do not see. And likewise my experience and cognition patterns will screen out material that you see, and it also will bring into view and perspective things that you don't. So that there needs to be a multiplicity of sources and healthy competition is the basic answer. So, your concern in that area with the effect of competition is important.

The report then goes on to treat several other

matters without regard to the effect of competition within the information apparatus of the country. The proposed new section, 107(b), is a recommendation that should be analyzed more closely from the viewpoint of its effect on competition between document fulfillment services in libraries, in college and university copying centers, and in the information-on-demand companies all providing "retail" access to photocopies.

It's the basic point I think Mr. Wedgeworth was making, that they need to be analyzed as a class and realize that the rules as applied have an effect on their competitiveness.

What is the effect of a different fair use standard or a much more limited fair use standard applying to certain categories of organizations? Why does it matter at all? Who makes the copy if it is a single, unrelated copy made for purposes set forth in the fair use section? What alternative approaches are possible?

A second example is the treatment of a library system as a single library for interlibrary loan purposes. And I may be doing just what the previous witness suggested might mischievously be done with the language. But it does appear that there are some problems in the treatment and the assumption that the photocopying within a single system deserves separate treatment.

Aside from the question of whether or not that interpretation of the law is sound and what alternative interpretations would have on the relationships between such libraries and publishers, what is the competitive effect of such a theory on the services offered by commercial retailers with which such libraries compete.

A third example is the recommendation to the Register of Copyrights with regard to her data collection efforts. Clearly under the new law data gathering on photocopying practices is going to be much more difficult than it was under the old law, for two reasons.

First, the new law is in effect, and there is no apparent grace period or period in anticipation of a new law coming into effect for photocopying practices. Everyone is likely therefore to be a little more taciturn and reluctant to give information.

Secondly, the report's statement about the photocopying practices of information-on-demand companies is not completely accurate and may be prejudicial to those companies. Some of those companies, contrary to the statement that they all perform photocopying services without authorization and without payment, there are some that did have arrangements with specific publishers and did make payment. That statement is unfortunate and could end up appearing in some lawsuits. And it's likely to discourage these firms that cooperated

fully with this Commission on our recommendations to be very anxious to cooperate further. They recognize that to build a sound foundation for their business, they have to work out these relationships and they have cooperated with you, and they are working with publishers to make those arrangements.

The report does in this way highlight something that may have gone unnoted otherwise, and that is that provision should be made for the Register to receive photocopy reports in confidence and to report them to the public as general broad based statistics. In the absence of such arrangements common to all statistical gathering involving proprietary data, the problems in obtaining meaningful statistics will be severe.

A fourth example of the insights to be gained by viewing photocopying in the context of the manufacture, distribution and retail economic functions relates to the section of the effects of future technological change, a section we found basically sound. It highlights the relationship between the distributor and the retailer.

Without addressing the data base questions, the subject of another subcommittee of this Commission, it would be helpful to the community if the Commission were to specifically address the issue of the machine reproduction of segments of data bases.

The bibliography developed as a result of a detailed search of a data base is frequently "bled off" from the mother

computer and stored in a minicomputer. Many times the search of the data base on the mother computer is a much more general search with the object in mind of getting, pulling, out of the data base a large segment of the file and then do the refined searching on a minicomputer off the main computer and without paying time charges or royalties to the data base. This is comparable to the photocopying practices in inkprint materials; the duplication of the printout by photocopy or photo offset also is a problem and is the equivalent of multiple copy photocopying.

While the law may not need amendment on this point, a clear statement from the Commission would be helpful in making it clear that the law applies equally to all kinds of machine reproduction.

We cannot restrain ourselves from responding to the subcommittee's suggestion that because these activities can be controlled by contract that somehow this is the answer to the problem. What is missing in this approach is the national uniformity and simplicity that marks the copyright approach; and what is unfortunately omnipresent in such an over-emphasis on the contract approach is the grey area of anti-trust law uncertainty--an uncertainty which is frequently a consequence of such excessive reliance on the contract approach.

It is our feeling that a fuller statement by the Commission is called for, relating more completely to the

complex of relationships controlled by copyright in the information marketplace.

The second point identified by our committee is a little more stunning, I think. If you were to ask anyone out there, whether they're in the library community or the information-on-demand business, "What is the most pressing question today? What is their biggest problem?" their answer would be, How do we distinguish between fair use and systematic photocopying? The report doesn't address this question in a meaningful way. We aren't sure what the answer is ourselves, although we make some suggestions here. We strongly believe that the development of the answer is an iterative process requiring each of us to take a stab at it and, by so doing, to advance the discussion, the understanding, and the narrowing of the complex issues involved.

As far as the industry is concerned, we think the question has gone about as far as it can go, looking at the question from the perspective of a person requesting the copy. As the report illustrates and as the discussion with the first witness illustrates, it is difficult to single out a particular photocopying agency for special treatment.

The answer lies not merely in who asks, for what purpose, or who makes the copy, but also in whether that copy is part of a systematic photocopying practice or is republishing of the original material.

If a photocopying agency, regardless of its tax status or its commercial or non-commercial purpose, engages in systematic photocopying, its behavior overrides the behavior of the person requesting the copy. That's one of those things the law seems to say in distinguishing between fair use and systematic photocopying. Certainly an individual for his own information will not be able to engage in systematic photocopying from his own materials for very long. It must be the suppliers' behavior which is controlling.

Commercial firms or libraries organized to provide and promote the availability of photocopies on demand from the British Lending Library through the number of libraries that are acting as fill sources for NTIS and the Linda Hall operation in Kansas City, whatever that service is called, are offering in effect to republish their holdings or other materials to which they have ready access. They seek to achieve an economy of scale in the provision of the service much the same as publishers do. To do otherwise is uneconomic and will not support such an organized effort or such promotion campaigns.

The assertion in the report that copying of single page articles is not an infringement will be hotly contested. What about abstract journals? How about trade publications or weekly news magazines? I doubt that Time Magazine would agree to that single-page definition. And, as was announced

just this past week at our meeting, Business Week has agreed to come into the clearing center and presumably on the basis of single-page photocopies of those business news magazines. How about daily newspapers?

The question isn't whether a single page is fair use. There are many other tests which must apply. Is the supplier engaged in systematic photocopying? Is the single page an entire article? Does the single page contain a graph displaying the essential "guts" of the entire copyrighted piece?

The statistics the Commission's comments rely on there should also include statistics based on the contra-assumption that photocopying single-page articles may in some circumstances constitute infringement and require permission.

The single-library concept relied on by the report also is subject to challenge on the basis of the systematic photocopying in question. At what point does such a library begin to engage in systematic photocopying? When one subscription serves 5 branches, 25 branches, or 100? These factors are relevant and need to be addressed.

It is clear such a system cannot have it both ways. It cannot photocopy more than 5 copies from a single journal anywhere in the system.

It cannot escape the "systematic" nature of its activities merely by taking out a single subscription.

Our committee urged that we make every effort

possible to make it clear how important it is to the Commission to move the dialogue on photocopying toward a resolution of this major outstanding controversy over fair use and systematic photocopying.

It further urged that the Commission direct its attention to a balancing of the behavior of the requester and the supplier. At the moment, the whole discussion is concentrating too heavily on the behavior of the requester. The law suggests otherwise, in our opinion.

In summary, we feel the report needs to address more of the complex of relationships in the information marketplace and to address the systematic photocopying question.

There were several other things in the report or absent from the report--the NIH photocopying practice, for example, the rule to the effect that the government has a license to photocopy any material in which its reports are carried. That begs the question of--that rightfully gives the government the right to the product of its report, but it also involves the government taking the value added by the publisher in producing the material. That is a question that is unresolved. One whole major area of government information activities that wasn't considered in the report--and it's expressly excluded from the report, at least mentioned as not being in the report--is the question of the information centers that are springing up all over the place. There are

probably two to three hundred information centers that have been commissioned by specific legislation, that if you saw the RFPs for them, you'd see that they called for the contractor to acquire all of the literature relevant to a particular subject area, make photocopies of it, provide two microfilm masters of it, and to operate an information-on-demand kind of facility in that subject specialty. Those are areas which I would think would clearly fall in the area of systematic photocopying requiring permission.

Thank you.

CHAIRMAN FULD: Thank you, Mr. Zurkowski.

Are there questions? Professor Nimmer.

VICE CHAIRMAN NIMMER: Mr. Zurkowski, I am not quite clear on your conclusion with respect to the proposed Section 107(b). You suggest further questions that should be considered. But are we to infer from that that it is your organization's position that 107(b) is inadvisable in its present form?

MR. ZURKOWSKI: The committee did not take a position on that. What was noted in the earlier discussion was noted by the committee, that there seemed to be a different treatment being provided commercial photocopiers, and they felt that it would clearly receive further consideration by the Commission. I don't have an answer for you on that.

CHAIRMAN FULD: Mr. Wedgeworth.

COMMISSIONER WEDGEWORTH: Just to press a bit on the question about the general class of organizations or institutions providing copies, do you see an essential difference, looking at the institution, between an organization which, regardless of its tax status, anticipates certain kinds of needs for materials under copyright, organizes to provide a copy service in response to those needs, usually individual requests? Do you see any difference between that kind of organization, regardless of tax status, and an organization which is in a sense like a service station--they've got all the equipment there--and the individual carries whatever they want to have copied to that facility and that facility simply provides copies in any numbers or whatever configuration the user wants, extracts, single pages, multiple copies? Looking at it from the macro-level that you're suggesting, do you see any essential difference in the way the law should treat those two classes of institutions?

MR. ZURKOWSKI: I'm not sure that I completely understand the distinction, but I think that I do, where in the second case the service would be essentially a photocopying service and nothing more.

COMMISSIONER WEDGEWORTH: Yes

MR. ZURKOWSKI: There are a lot of dimensions to that. And I would think that in the latter case there would be matters--there would be situations where the user's

behavior would be controlling in that what the service is offering is essentially neutral with regard to the intellectual content of what goes on, what appears on the copies to be made.

COMMISSIONER WEDGEWORTH: That gives me a bit of a dilemma though because you just stated that we might profit from moving away from the perspective of the individual requester to looking at the institution. And I think that I was willing to accept that if I could get some sense of whether you saw any real distinctions at the institutional level in those two kinds of services.

MR. ZURKOWSKI: I suggested the distinction. I did not mean to imply that we abandon the user's behavior, but I'm suggesting that as a basis for analyzing what's fair use, what I'm suggesting is that that has been analyzed about as far as it can go, and you need to start thinking about what other factors are involved. And what I hear you describing in the second category is the Panic Press down the street here that offers an offset press and photocopying service as distinguished from a question answering or a service concerned with the information content of what is being photocopied.

COMMISSIONER WEDGEWORTH: Laying aside the distinction between, say, a commercial organization which provides an information or copy service on demand and non-commercial operation, which is a question I believe needs to be reviewed,

I really was trying ro get at what you meant by shifting the analysis away from the individual requester because what the subcommittee report sought to do, in my opinion, was to suggest that perhaps in the case that I outlined, the user behavior may be controlling. And I thought that I heard you agreeing with that.

MR. ZURKOWSKI: It is not the purpose of our testimony here to suggest that under no circumstances will the user's behavior be controlling. We think, on the contrary, there are circumstances under which the user's behavior is controlling. However, where there are these several layers of activity aimed at a systematic way of distributing information, then the user's behavior becomes secondary to that systematic approach. And I think the language to support that is in the report and the law.

COMMISSIONER WEDGEWORTH: What in your opinion really is the dominant factor in getting at a useful approach to the question of systematic? Are you looking at this from the organization's point of view in terms of some characteristics of the organization, or does it completely exclude the way in which it services its clients?

MR. ZURKOWSKI: I think it has a great deal to do with the way it services its clients. I think that that is where you will find the elements of what constitutes systematic.

CHAIRMAN FULD: Mr. Cary.

COMMISSIONER CARY: Mr. Zurkowski, in connection with your statement that the report is unfair and prejudicial to the information-on-demand companies because of the fact, as I take it, you indicate several of these already had authorizations for copying and made specific arrangements. Is that your point, or do you have any other unfair and prejudicial indications?

MR. ZURKOWSKI: No. It was the statement in the report that just--I'm not sure what page that is. Do you have the page?

COMMISSIONER CARY: No, I don't have it here.

MR. ZURKOWSKI: The statement in the report stated unequivocally that they were all performing these services without authorization and without arrangements with publishers, and that is predominantly true perhaps; but there were examples of arrangements that had been made. And as more companies got into that business and as they grew larger, they have been and are today working hard to get the permissions and to work out the arrangements to provide the copying and to provide payment.

COMMISSIONER CARY: Thank you. I just want to be sure that that was all you had.

CHAIRMAN FULD: Mr. Miller.

COMMISSIONER MILLER: Paul, I'm trying to get some

sense of the dimension of the problem you're suggesting in the second paragraph of your point one on page one where you say by omitting consideration of certain relationships, the report suggests several interpretations which we feel will prejudice. Now, are you saying that the report is skewed because of its preoccupation with only one facet? It's unfair to project? What are the kinds of things you think the subcommittee has omitted?

MR. ZURKOWSKI: I think that the situation is something like this, that you have producers of copyrighted materials. You have distributors of those materials. And you have essentially the retailers who are making those materials available to the public. And you have within each of those categories different classes of each of those, based on our tax system and on our governmental system. And there is a need to analyze the complex of relationships between institutions which are vertically integrated and provide the whole range, others which function as distribution and retailing functions and others which just perform one of those functions, taking into account the different classes between them.

For example, the Linda Hall library operates and is structured as a distribution and retailing function. What is the relationship between what it is doing and what we consider to be socially desirable functions of the information-on-

demand companies that are doing similar things? And what is the effect of the differing standards under 107 and 108 as between those organizations, and how does that impact the availability of information to the end user?

COMMISSIONER MILLER: Your objection to the draft is the lack of inclusion?

MR. ZURKOWSKI: Yes.

COMMISSIONER MILLER: And you're suggesting that there is a skew by virtue of that?

MR. ZURKOWSKI: We're suggesting--and we cited a number of examples in each of those, in that area--where by failing to take into account the different clases and the different functions, the recommendations are a little skewed, yes.

COMMISSIONER MILLER: You're also quarreling with the empiric base, the lack of coverage?

MR. ZURKOWSKI: Yes.

COMMISSIONER MILLER: And the projection?

MR. ZURKOWSKI: Yes. And I don't think it's the Commission's fault. I think it is probably our fault or the emerging nature of the information age because there certainly is no research comparable to the research on the relationship between publishing and library photocopying, for example, on which you could rely. Some of this stuff you may have to speculate a little bit about, so that it may be too early.

It isn't a harsh criticism. We are just trying to call it to your attention.

CHAIRMAN FULD: Ms. Wilcox.

COMMISSIONER WILCOX: Mr. Zurkowski, are you suggesting in that example that there is--when you say that Linda Hall is the same as, except for the tax structure, an information demand--that there is no difference in the purchase of the original material and the owning of it?

MR. ZURKOWSKI: I hear your point. No, I am not suggesting that. I think there are differences, and I think the point you're making is that there are information companies that position themselves adjacent to libraries and do not own some of the materials they photocopy. They have their own libraries, but they rely on public libraries for access to other materials, and that may be a factor you have to take into account.

COMMISSIONER WILCOX: So, there are distinctions, differences.

MR. ZURKOWSKI: Yes. Yes.

COMMISSIONER WILCOX: Okay, I just wanted that.

CHAIRMAN FULD: Mr. Zurkowski, did your remarks encompass the statement on page 90 of our report that "However, the privilege of individual customers to make fair use of copyrighted works under the terms of 107(a) does not necessarily extend to commercial copiers who supply the

individual with copies"?

MR. ZURKOWSKI: No, that's an example where the assumptions are not taking into account the competitive effect on the relationship.

CHAIRMAN FULD: Are you suggesting that fair use to the requester may be relied upon by the copier?

MR. ZURKOWSKI: There are some followup questions to that that I would answer as well, but--

CHAIRMAN FULD: I mean, if it's fair use to the requester, should it not be fair use to the...

MR. ZURKOWSKI: I think there are cases in which the organization behavior is such as to render the fair use behavior of the user almost irrelevant, that when there is a trade-off to be made between going to a public library and ferreting out the stuff you want yourself and going to the machine in the hall and making a copy of it and going to a firm that says, "We'll do all of that for you," and you dump your request on them and they produce what it is and maybe find something else that you didn't know about and make copies of that, I think there is a trade-off which the user should be prepared to recognize has a legal impact on his obligation to pay the publisher.

CHAIRMAN FULD: Mr. Levine.

MR. LEVINE: Is your concern with how we define commercial copiers? You're talking really of what we call

information brokers. But do you feel the same way about the--

MR. ZURKOWSKI: The recommendation--mixing those two things up is a little bothering to me. I'm not sure that that is logical, that you should put the college bookstore that offers a photocopying machine in the same category as the on-demand company. I am not sure of all the implications of that, but I think they have to be addressed.

Is that the point you were getting at a little bit, Bob, early?

COMMISSIONER WILCOX: No.

MR. ZURKOWSKI: No?

COMMISSIONER WEDGEWORTH: Partly. You answered my question.

CHAIRMAN FULD: Do I understand you find fault with the statement on page 90? Or you did not, if it's limited to commercial copiers?

MR. ZURKOWSKI: There are several things about the statement. If you take an information-on-demand company, how do they get their orders? They get their orders over the telephone or by mail or by having somebody out and selling the services, asking an information-on-demand company to post a notice on its photocopying machine where no customer ever appears, never sees that; it's like asking NLM to post a notice on the service it provides. Admittedly the law requires notices elsewhere, and a notice requirement is

reasonable. But it doesn't make much sense in the information-on-demand environment where the user never shows up anywhere there and never sees the notice, and the notice seems to be directed at the user.

CHAIRMAN FULD: Are there any other questions?

COMMISSIONER LACY: One, if I may.

CHAIRMAN FULD: Yes.

COMMISSIONER LACY: Paul, your reference to the two or three hundred, I believe you suggested, information centers that were being subsidized by the government under contract--I'm familiar of course, and I guess we all are, with large scale operations like ERIC or NTIS or Medline that may in a sense fall in this category. But I really hadn't been myself aware of this large a number of specialized centers, and would be interested--and perhaps other commissioners would--in learning more about it. I wonder, do you have or could pull together any documentary description of this or more detailed statistical stuff? I'd like to see them.

MR. ZURKOWSKI: There are things like the Center on Smoking and Health and on cancer. They just permeate the whole government structure. And they serve a useful function. I have had many calls from members of the Association who have wished to bid on those contracts and wondered what their copyright status is, and it turned out that the Federal Tort

Claims Act places the sole remedy for copyright infringement on the government. And I think this Commission ought to make some recommendation as to what the government's policy ought to be where there is clearly a systematic use of copyrighted material.

COMMISSIONER LACY: Whatever information you could readily pull together on that would be useful.

CHAIRMAN FULD: Thank you very much.

MR. ZURKOWSKI: Thank you for the opportunity.

CHAIRMAN FULD: Our next witness and our last speaker for this morning is Mr. Robert Frawley, staff attorney of the Pharmaceutical Manufacturers Association. He served under the Trademark and Copyright Committee of that association which is comprised of lawyers in the pharmaceutical industry.

We are pleased, Mr. Frawley, to welcome you to this meeting.

MR. FRAWLEY: Thank you, Mr. Chairman. I might add before I start that the Trademark and Copyright Committee is becoming more and more a copyright committee than a trademark committee now that the law has been passed.

CHAIRMAN FULD: Is that good or bad?

MR. FRAWLEY: I don't know.

Good morning. My name is Robert D. Frawley. I'm a staff attorney with the Pharmaceutical Manufacturers Association. We are a voluntary, non-profit association composed of

127 companies engaged in the research, development, and manufacture of prescription drugs, medical devices, and diagnostic products. I am appearing here today not as an expert in copyright law but rather as a representative of people who use copyrighted works.

My purpose in being here is to try to focus the attention of the Committee on the general uncertainty which faces users of copyrighted materials and to express our support for the broad-based study of the effects of the act which has been proposed in the draft report.

The development of new pharmaceuticals is a process in which the public has a definite interest, and the Federal Government has strict requirements regarding the type and amount of data which we must generate to support the safety and efficacy of new health care products. Our industry, however, is not unique in this regard. The public interest in product development grows as government regulation extends to more industries, and more and more products are subjected to increased testing and pre-marketing clearance requirements. Research is obviously a necessary part of this development process, and research cannot survive without the rapid dissemination of new knowledge.

Because the dissemination of information includes the use of copyrighted works, research-based industries have a vital interest in the new copyright law. As we are

all aware, much has been written about the new law by various groups, and many of these writings have been inconsistent, particularly with regard to Sections 107 and 108. Persons trying to comply with the law are having a difficult time.

In discussing Section 107, for example, the four broad criteria listed there are sometimes cited as an exclusive definition of fair use, when the Act does not intend to so define or delimit that concept. Fair use, as we all know, is a factual question, to be decided on a case-by-case basis. The legislative history recognized that the doctrine is an equitable one, based on the rule of reason, and that no clear definition has ever emerged.

Section 108 also presents some problems which are incapable of easy resolution. The status of corporate libraries and interpretation of the phrase "direct or indirect commercial advantage" are examples of issues upon which there are divergent opinions.

The Association of American Publishers and the Special Library Association, as an example, have published guidelines which embody different interpretations of this provision. Even the legislative history of the Act is in conflict.

The Senate report, for example, would appear to remove corporate libraries from the provisions of Section 108 on grounds that copies made for corporate employees would

be for the purpose of furthering the commercial enterprise of the organization. Yet the House report defines " commercial advantage" as profit earned from the sale of copies rather than profit which may eventually result from use of the material.

I cite these instances only as examples of the wide range of issues which remain unresolved under the act.

In view of this situation, we would ask the Commission to reconsider a statement made on page 89 of the draft report, which says: "The 1976 Act and the legislative history including the educational copying, music copying and CONTU guidelines provides fairly clear guidance to educational institutions, libraries, and archives engaged in copying and individuals requesting copying from these institutions."

We realize that CONTU has published guidelines which do give guidance to some groups, but we think that this general statement, used as it is in introducing an amendment to the Act, could give the impression that users of copyrighted works should have no problems under the photocopying provisions except for the one addressed in the proposed amendment.

We suggest that the statement be modified to refer only to those groups for whose benefit the guidelines have been issued. We would further suggest that the Commission

highlight some of the conflicting interpretations that exist under Sections 107 and 108, when discussing the study required by Section 108(I).

We think it would be appropriate for the Commission to urge the Register of Copyrights to actively seek the views of users of copyrighted materials. The Register of Copyrights should be encouraged to initiate contact with researchers, medical and scientific investigators, and businesses in the conduct of their study.

The draft report on photocopying is an impressive undertaking. The final report will undoubtedly be considered an authoritative source of information on the new copyright law.

We therefore believe it is important that CONTU discuss the uncertainty caused by Sections 107 and 108, and that the Copyright Office be encouraged to consider these problems in the study mandated by Section 108(I).

This concludes my formal presentation, and I will be happy to answer any questions you may have.

CHAIRMAN FULD: Are there any questions?

COMMISSIONER LACY: Mr. Chairman, I have one. I take it, Mr. Frawley, that you're not recommending anything beyond the fact--you're not in effect asking CONTU to resolve the uncertainties but merely to call attention to their existence and urge their resolution in the Copyright Office

study.

MR. FRAWLEY: That's correct, sir. We think the law hasn't been in effect really long enough for a lot of these problems to shake out, if you will. And I think that if the Register of Copyrights would--if the problems were brought to the attention of the Register of Copyrights when the study--

COMMISSIONER LACY: Are there any specific problems that you have in mind, or is there just a general aura of uncertainty?

MR. FRAWLEY: I hesitate to bring up a laundry list, but things like the relationship of 107 to 108. What is fair use? Some people have said that 108 is exclusive of 107. Some people say that some of the things you can do under 108 you can do under 107. I didn't come prepared with a list of problems to be resolved. I think this is probably more properly within the scope of the study to be conducted by the Register of Copyrights.

COMMISSIONER LACY: Thank you.

CHAIRMAN FULD: Mr. Levine.

MR. LEVINE: Mr. Frawley, has your association issued guidelines to your membership on how to deal with Sections 107 and 108?

MR. FRAWLEY: No, sir, we haven't. Individual companies have issued guidelines for their own internal use, but we have not as an association issued guidelines.

CHAIRMAN FULD: Are there any other questions?

Thank you, Mr. Frawley.

MR. FRAWLEY: Thank you, Mr. Chairman.

CHAIRMAN FRAWLEY: We will recess now until 1:45.

[A luncheon recess was taken at 11:45 a.m.]

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AFTERNOON SESSION - 1:50 o'clock

CHAIRMAN FULD: Dr. Frank E. McKenna is our next speaker. He's the Executive Director of the Special Libraries Association and Chairman of the Council of National Library Associations' Committee on Copyright Law, Practice, and Implementation. He appeared before the Commission in October of last year. Today he will present his committee's reaction to the draft report of the photocopy subcommittee.

We look forward, Dr. McKenna, to your remarks. Do you want to introduce your associates?

DR. McKENNA: Yes, I will. Thank you, Judge Fuld and members of the Commission. When the CNLA committee was originally organized, we felt that we were showing wisdom by designating six principals of the committee and six alternates so that at any meeting of CONTU or of our own committee that each association would have a representation.

However, it seems that our wisdom was not carried quite far enough. The months of April and May are always difficult months in the lives of library associations. So,

there are only three of my colleagues with me, and two have not appeared before the Commission before.

At the extreme right is Miss Ellen Mahar of Shea & Gardner here in Washington. She appears for the American Association of Law Libraries, substituting for Julius Marke.

The American Library Association is not represented today. Dr. Holley is on an accrediting team at the University of Mississippi. And Miss Eileen Cooke, his alternate, who is director of the ALA Washington office is involved with the House Appropriations Committee, as I understand it.

CHAIRMAN FULD: I would think that's more important.

DR. McKENNA: I am sure she will be pleased to hear your evaluation.

At my immediate right is John Lorenz, Executive Director of the Association of Research Libraries, and he has appeared before CONTU before.

At my left--Mrs. Nina Matheson cannot be with us because she is the chairman of a regional library advisory council meeting today. And her substitute is Mrs. Naomi Broering, who is chairman of the MLA Legislation Committee. Mrs. Broering is librarian of the Georgetown University Medical Center Library here in Washington.

Neither the principal nor the alternate of the Music Library Association is able to be here because of conflicting schedules.

And, as you have noted, I represent Special Libraries Association as well as being chairman of the CNLA committee.

The CNLA document which had been submitted to CONTU--we have very little to say other than what is in the document itself. We do wish to emphasize our statement on page 2, that we comment favorably on the recommendations contained in the photocopying subcommittee's draft report and in particular we recorded our concurrence with two statements. The first, that there can be no directly applicable evidence without some experience with the new law only a few months in effect. And the second, the Copyright Office is the appropriate body to review and assess photocopying practices for the first five-year report under the new law.

In relation to the proposed subsection 107(b), we are in sympathy with the objectives of this proposal regarding, quote, "commercial copiers," unquote. And let me emphasize the quotes around those words because as we understand the photocopying subcommittee document, it refers to organizations who are in the business solely of preparing photocopies.

However, we are concerned that in transmitting the final report of CONTU to Congress and possibly in rewriting, redrafting, in Congress that there could be a confusion about the term "commercial copiers" and the organizations that they represent.

We would propose that a sentence be added to the

proposed Section 107(b). Quote: "In no way does Section 107(b) affect the subsisting rights in Public Law 94-553." In other words, that by adding 107(b) to the Copyright Act, there is no chance for misunderstanding by any person or any party at a later date.

Under the mechanism for data collection for five-year review, part VIII-D(3), there is the suggestion that library surveys conducted by the National Center for Education Statistics be used to collect photocopying data. And our suggestion is that rather than using an organization such as NCES, a qualified organization, a qualified contractor such as King Research or a similarly qualified organization, be used rather than NCES. And in this connection, we note that the responsibiiity for the review has been given to the Register of Copyrights, and it would therefore appear logical that the decision rests with the Register as to who should conduct the studies.

A matter of concern to us in the body of the report, not in the conclusions, is that there appear to be interpolations and extrapolations of the King Research data. And within our understanding there is inadequate evidence as to the validity of some of these manipulations, and we feel that interpretations that are not in the King report itself can be open to challenge. And we would recommend that such interpretations not appear in the final report.

We note particularly on page 21 it is admitted that arbitrary estimates have been made. For example, quote: "Items photocopied for users in libraries in for-profit organizations to take into account that portion of these libraries which are not eligible for the benefits of Section 108(d) because they do not choose to be open to the public or specialized researchers.if one makes an arbitrary estimate," et cetera, unquote. Now, this matter of course affects primarily some special libraries and some law libraries. To the best of our knowledge, with the exception of possibly two or three libraries that exist in geographically situated locations that are subject to security classification, that all special libraries, if not open to the public, that their resources are available to appropriate researchers in the field either through the mechanism of physical interlibrary loans or photocopies.

We have also questioned the validity of the assumption of an average copying fee per article of one twenty-five under resultant calculations that emerge therefrom. Further, that statements concerning libraries in business and industrial establishments to the effect that their copying costs are for purposes of increasing the revenue or reducing the cost of the business and that such fees would be a tax-deductible cost, we feel that this is an inappropriate conclusion.

Let me cite just one area. In a research establishment--and I do not necessarily mean a scientific research establishment. It could be research in a financial house, a museum, or any organization. From the first investigation until the final point where revenues would increase or costs would decrease, that period of time is essentially an immeasurable time. There have been attempts to make such determinations. And, to the best of my knowledge in some 25 or 26 years, only in one instance was it possible to actually get a measurement of the elapsed time. So that it seems like a rather gratuitous statement to include in the report.

We comment briefly on the CONSER project and its computerized data bases, and we note that all problems relating to periodicals are of a greater order of magnitude than similar problems relating to monographs because, by their nature, periodicals appear 12 times a year, 52 times a year, or whatever their frequency is.

On page 66 of the subcommittee's report there is a statement which invites comment about the plus or minus 30 percent margin of error at a 95 percent confidence level in the King study. The CNLA committee was somewhat surprised that such a question was being thrown out for public comment. We wondered why the question of the validity of this plus or minus 30 percent margin of error had not been addressed directly to King Research, Incorporated.

In the matter of the National Periodicals Center, our primary concern, as noted on page 7 of our document, is that there are so many intangibles discussed or suggested. Since very little is known about the thinking, even at this present time, as to how that National Periodicals Center will develop, we feel that it is not appropriate that the final CONTU report should speculate on how such a center might operate, how it might compete with for-profit organizations, why it might not be eligible as a library under the Copyright Law, what kinds of agreement with it publishers might make, and how some of these agreements might be discriminatory.

Our concern is that such speculation, in addition to being potentially inaccurate and prejudicial, may also have a chilling effect on free and creative and cooperative enterprise which will be required to plan and implement this proposed center.

As our conclusion, we have noted a paragraph from our document presented to the Commission on October 21, 1977, and for emphasis may I read that? Quote: "With the experiences to be gained during the next five years with this new legislation, all parties concerned will be better able to fully assess the impact of the new law on their individual goals and on their common goals to provide all users of copyrighted works with ready and reasonable access to information," unquote.

The CNLA committee again commends the CONTU photocopying subcommittee on its recommendations, and we respectfully urge that manipulation of existing data and arbitrary estimates and assumptions be omitted from the final report. And we express our appreciation to members of the Commission for your continued activities and interest. Thank you.

CHAIRMAN FULD: Thank you.

Mr. Cary.

COMMISSIONER CARY: Mr. McKenna, with regard to the dollar and twenty-five cent fee which you took issue with, is that because the Fry report had indicated a dollar might be the average, or is there some other reason?

DR. McKENNA: We did not consider the Fry report or any other report per se. A combination of the Fry report, the Palmour reports, and other documents seemed to indicate that there is a greater variance in this matter than just a simple dollar and a quarter. This, like the other numerical figures that are presented here, we do not feel contribute to the conclusions. The conclusions we feel are valid in themselves, and we do not see that the various numerical data cited are appropriate or necessary.

COMMISSIONER CARY: Thank you.

CHAIRMAN FULD: Are there any other questions?

COMMISSIONER LACY: Not so much a question as a couple of brief comments. While obviously there would be

difficulties involved in getting a copyright status record into the CONSER files with respect to periodicals, it would seem to me that perhaps both Mr. Price's testimony this morning and statements here this afternoon may exaggerate those difficulties somewhat and might discourage what could be a very useful undertaking. We're concerned obviously only with the year, date, of publication. And the fact that there are 52 different weekly dates or 12 monthly dates is really irrelevant to the copyright status. You just need a year of publication since copyrights expire at year end and not on the anniversary of actual publication.

And in any event, it would be only in the rarest incidence where it became an important copyright question as to whether this was the 74th or 75th year since publication. The real issue involved is whether the relatively recent issues, the last few years of a publication, are under copyright or not--that is, whether the publication is copyrighted--or if copyrighted, whether the publisher may have dedicated a reproduction right and indicated his willingness. This is information rather simple to obtain and enter and would be extremely valuable, I should think. And I don't think we should worry too much about the fringes of information.

The other point, on the tax status, was raised. It is of course the case that non-tax exempt, profit-seeking corporations with libraries do, I believe, uniformly deduct

the costs of running their library, including the photocopying costs as a routine cost of doing business. Hence, the Federal Government pays half of that cost for them, and this does mean that the burden on a non-profit institution is twice that on a profit-seeking operation in paying license fees, and I think this is a relevant fact and should be mentioned in the report.

DR. McKENNA: May I comment on Mr. Lacy's first point? If the intent of including copyright information in the CONSER project is to be only in recent years--say, the past five years and forward into the future--we would not find any problem there. Our concern was, as we read or understood the implication, that the suggestion was to introduce the entire copyright record into the CONSER files.

COMMISSIONER LACY: I think that's desirable when available.

DR. McKENNA: Right.

COMMISSIONER LACY: But, in the first place, the fact that there are 52 different issues is irrelevant. A copy published in 1911 is published in 1911; it doesn't make any difference whether it's January or June, 1911.

DR. McKENNA: Unfortunately, all publishers are not quite as specific as McGraw Hill, for example, if you will excuse my personal reference. There are publishers whose issues, let's say, for 1976 are not appearing until 1977 or

later. So, there can be a year or two years.

COMMISSIONER LACY: There could be a difference from year to the other, but that's true also of monographs. It may be uncertain whether the actual publication of a monograph is one year or the other. But it's just that the number of issues--it's not 75 years now from the date of the specific issue. All the issues for any one year are lumped under that year. So, that wouldn't add anything to the difficulties involved. And, of course, if one had to do a minute research as to whether copyright notice had been perhaps inadvertently omitted from a particular issue, published in 1937, it would become extremely difficult to build up a detailed CONSER issue. But I don't think we ought to think of the difficulties of achieving perfection stand in the way of the relative ease of doing what's the most useful job.

DR. McKENNA: It was not our intention that this should be a major part of our--

COMMISSIONER LACY: I didn't assume so. I just really wanted to clarify the record.

CHAIRMAN FULD: Yes, Mr. Miller.

COMMISSIONER MILLER: Mr. McKenna, your comments on the subcommittee's report dealing with the National Periodicals Center--you seem to be opposed to speculation. And I'm a little troubled because your suggestion that we not

speculate as to some of these things strikes me as inconsistent with Mr. Zurkowski's testimony this morning, which invited us to speculate on these things for the good of the community.

Do you have any observation as to that dichotomy?

DR. McKENNA: I think the dichotomy has been one of some standing--[laughter]--that information associations and some other similar organizations and the library community have existed in a state of di- or trichotomy.

COMMISSIONER MILLER: That doesn't help us very much as to which side of the speculative line we should fall.

DR. McKENNA: If you will note in our document, the word "might" has been emphasized some six or seven times. And we did that because there are so many areas in which there is speculation. It is our understanding that the first appointment of an individual to start the planning occurred only in January of this year. And, to our knowledge, there has been no public statement as yet as to how the thinking has gone to this point.

COMMISSIONER MILLER: You don't think it would help the community to have considered speculation?

DR. McKENNA: I would say--and I think my colleagues would agree--that some speculation is appropriate. But when on one item alone there are some seven or eight clauses of speculation, could all of these speculations cumulatively build up into a totally erroneous conclusion?

CHAIRMAN FULD: Mr. Wedgeworth.

COMMISSIONER WEDGEWORTH: Dr. McKenna, would it be helpful if, in looking at this question--and I believe some of the testimony this morning suggests that it's even more complex than the subcommittee expressed it in its report--would it be helpful if we were to generalize the comments about some of these agencies rather than make them so specific with regard to a National Periodicals Center?

DR. McKENNA: Yes. I think again my colleagues will agree--and if they don't, each one certainly can speak up--that your suggestion to generalize without specifically identifying organizations would greatly improve.

COMMISSIONER WEDGEWORTH: You are not saying that we shouldn't speculate at all about these various developments because the origin of that section relates directly to some of the limitations that were placed on the CONTU guidelines when we said at the end of those limitations that they didn't apply to certain kinds of organizations that may subsequently develop. So that if we talked in more general terms, you think that this might be an appropriate thing for the CONTU?

DR. McKENNA: I think this would certainly be an improvement over the present presentation.

COMMISSIONER WEDGEWORTH: Thank you.

DR. McKENNA: For example, the National Periodicals

Center itself could--its development could be thwarted or pushed in another direction if the document, these recommendations, were to evolve in the final report.

Mr. Lorenz.

MR. LORENZ: I tink the principal point is that at this time we simply do not know what the outlines and specifications for a National Periodicals Center are going to be and that it's dangerous to speculate. There is just as good reason to believe that such a center in its development will work very carefully and closely with publishers in developing the center and its operation.

CHARIMAN FULD: Are there any other questions? Mr. Levine.

MR. LEVINE: This is a very direct question. The last time the Library Associations appeared before the Commission was in October of '77, before the new law went into effect. And I wonder whether you have any sense yet of how the new law is working, if it is working, and whether you've gotten any feedback from your membership on it.

DR. McKENNA: I can speak only for the Special Libraries Association, from personal knowledge, and perhaps one or more of the other persons can speak from their associations. In June of this year, as is customary, SLA will have an annual conference. We again have planned a program session on the new copyright law and its effect. Two

of the speakers have been invited for very specific reasons. One is a representative of a large supplying library, the other of a relatively small requesting library. They have been asked to report more or less an ad hoc situation as to their experiences between January and June, 1978.

As for specific instances as to what has happened between January and April, I have really nothing to report other than there are concerns, legitimate concerns. Are we within the spirit of the law? Are we within the word of the law? However, the number of these concerns appear to be decreasing as each individual library sees how its operation can be adjusted to fit the new law.

MR. LORENZ: Speaking for the approximately 100 research libraries that I represent, my observation would be that the law and the agreed upon guidelines and congressionally approved guidelines have struck a fair balance. That's my impression at this point, that our member libraries are coping successfully with the law and the guidelines. I would say that there is a diversity of practice out there, but I don't see any great harm in that diversity. I think that this country is built on diversity, and that it is not damaging either to the institutions or to the publishers and authors.

DR. McKENNA: Mrs. Broering has I think a few words to say from the experience of medical libraries.

MRS. BROERING: The Legislation Committee has sponsored several meetings for the Medical Libraries Association in which our attempt has been to disseminate the knowledge about working and complying with the law. And there has been, I would like to report, really a great sincere interest on behalf of all the medical librarians to comply with the law and do everything that they can to remain within the spirit of the law, almost to the point of following it a little bit too closely, a little bit more closely than perhaps you would even interpret it. We did issue a brochure that has been distributed to all the members, and that has been extremely helpful. And we have also advised our members that if they do change their copying policies, to work with their administrators, be it hospital administrators or university administrators, and go through legal counsel.

And I'm pleased to report that most of the groups that have kept a close correspondence with us have been complying with these wishes, and they're getting everything checked out.

There have been a few misconceptions with regard to the law, a lot of misunderstanding. So, we are constantly issuing statements in our newsletter to help the members. And we are planning in our annual meeting this year to have another session in which we are going to have a question-and-answer period to help the hospital--it's primarily the

hospital librarians that are in the one-man situation. They don't have a colleague with which to compare notes that will come to the meetings and ask questions. We answered a lot of mail too.

DR. McKENNA: And I think Miss Mahar has something for law libraries.

MISS MAHAR: I haven't heard of any great problems either in the law school level or in the law firm area. Regionally our chapters throughout the country have held sessions since October, which is when our meetings begin, instructing the membership about the new law and what they need to do to comply.

CHAIRMAN FULD: Thank you. Yes.

MR. APPLEBAUM: Are any of your libraries at this time collecting fees to operate a clearance center?

DR. McKENNA: I do not know the answer to the question. When you say, "Are the libraries collecting fees?" do you mean, "Are the libraries paying fees"?

MR. APPLEBAUM: Either.

DR. McKENNA: Because in a special library--and medical and law are certainly specialized varieties--there would be very little chance of collecting from a library user. If the question is payment, I do not know the answer to that question either.

MR. LORENZ: I do know that some of our member

libraries have signed up with the Copyright Clearance Center. Just what the transactions have been up to this point, I do not know.

CHAIRMAN FULD: Thank you very much..

COMMISSIONER LACY: Mr. Chairman, I wonder, since there isn't a representative of ALA at the table here if either Mr. Wedgeworth or Mrs. Wilcox would like to add anything about ALA's views on the experience since the first of the year.

COMMISSIONER WEDGEWORTH: I think Alice might be in a better--

COMMISSIONER WILCOX: Eileen is back.

COMMISSIONER LACY: I hadn't seen her. I'm sorry.

DR. McKENNA: I'm sorry, I didn't see Miss Cooke come into the room.

MISS COOKE: I'm sorry I'm so late. Let me just speak from this point, that we haven't had any specific reports on how the law is affecting our members. We have, however, had a satellite conference on copyright as one more way of trying to educate our members. It has been highly successful as an experiment in trying to disseminate information on a rapid basis. And we're in hopes that the states will pick up on this as one more way to get the word out on how the law is working.

As far as reports from the libraries, I'm anticipating

we'll start getting those at our annual conference in June when we're devoting an entire morning that's sponsored by many of the divisions to the copyright question.

CHAIRMAN FULD: Would you identify yourself for the reporter.

MISS COOKE: Eileen Cooke, the Director of the Washington Office of the American Library Association.

CHAIRMAN FULD: Thank you, Dr. McKenna and associates.

DR. McKENNA: Thank you, Judge Fuld and members of the Commission.

COMMISSIONER LACY: Mr. Chairman, I wonder if I could make just one quick observation. I was interested to note that each or almost each of the associations was planning at a forthcoming annual meeting to have a special session on copyright. One of the questions I keep hearing from time to time is a divergence of understanding that may exist in many places about the functions of the Copyright Clearance Center, and it occurred to me that if a representative of the Center were able to take part in some of these sessions, he or she might be able to do two things--one, clarify what the Center was attempting to do and also what might be more important, try to get a better feel of how the Center could be more useful to libraries in facilitating their clearance problems and that sort of thing. And I would just like to, as an act

of presumption, express the hope that a representative might be included in some of those sessions.

MR. LORENZ: I would like to state for the record that the Association of Research Libraries at its meeting in May is also having a session on copyright.

I'd like to state further that--and perhaps repeat and underline--that the libraries out there are really trying to understand the law and the guidelines. I feel that in that circumstance no further unofficial guidelines should be issued, certainly not labeled guidelines, because that's the term that has been used by the congressionally approved guidelines. If any further statements are issued, I think it should be quite clear that these are unofficial, that they're subjective, and opinion.

DR. McKENNA: May I say just a word in response to Mr. Lacy's suggestion?

CHAIRMAN FULD: Yes.

DR. McKENNA: I am sure that all of the associations in June of 1977 had programs, general sessions, on copyright. I believe I am correct that at that time each association had a representative of the AAP discussing the potential clearance center which had not yet been jelled. Also in January and February of this year at the winter meetings of most of the associations, copyright was again a matter of discussion.

CHAIRMAN FULD: Does anyone else want to say anything?

Thank you very much, Mr. McKenna and your associates.

DR. McKENNA: Thank you again.

CHAIRMAN FULD: Our final speaker for the afternoon is Mr. Charles Lieb, copyright counsel for the Association of American Publishers. He has appeared before us in January, April, and October of last year. He will present AAP's reactions to the draft report of the photocopy subcommittee.

Welcome again, Mr. Lieb.

MR. LIEB: Thank you. Thank you too for allowing me to appear before you on this beautiful Washington spring day. I live in Connecticut where it's still winter.

I do not have a prepared statement to submit today, but I should like to ask leave to submit it. And if you would give us permission, we promise to submit it with all dispatch.

I'll go directly to our view of your recommendations, with just a preliminary comment that we think that for the reasons that the report itself states, that the statistics of copying copyrighted material that goes on in the country are very considerably understated; but, nevertheless, they serve as a good springboard for the discussion.

In approaching your recommendations, we regret that we don't find one recommendation that we had hoped to see,

and that is that CONTU would recommend that the parties agree on guidelines for the areas of the law which are still open and which require fleshing out. Those areas, of course, are copying what your report calls and the King report calls local use, copy for intrasystem use, which is a term that was new to me until I read it in the King report but which is defined in the King report, and I accept it; and, of course, copying for interlibrary arrangement purposes of material that's more than five years old.

We had hoped that CONTU would consent to serve either as a moderator or a conciliator of meetings of the interested parties, which it would call. And we think that it's a mistake and, with deference, we think almost it's a relinquishment perhaps of part of the duty that was assigned to you.

We think that clarification is badly needed. The law is not self-explanatory. What is needed is--whether you want to call them guidelines or whether, as Dr. McKenna suggested, because Congress has finished its work, guidances or recommendations, would make no difference to us--but we think some sort of consensus is needed, hopefully to be developed among the parties themselves, so that the working librarian and the working publisher and other interested parties will be able to understand statutory terms which, by themselves, convey no real meaning.

One point I want to make--when I mention that not

only copying for local use and for ILL use of material over five years that requires clarification--on this newfangled intrasystem copying, I want to enlarge for a minute on the suggestion that was dropped this morning by one of the speakers. I don't think you can have it--I don't think the library community or I don't think really it's possible under the law to have it one way. If branches of a library are to be treated as a single library for purposes of interlibrary arrangements--thus for the transfer of material from one branch to another--that is, not to be considered as falling within the limitations of the interlibrary CONTU guidelines--then the other side of the same coin, I submit to you, ladies and gentlemen, has to be that then if there are limitations on what I call in-house copying or what in your report you call local copying, those limitations have to apply to the aggregate use by all of the members of the system, all of the branch libraries, to determine at what point the copying that up to that point had been isolated and unrelated and non-systematic becomes the opposite of isolated and unrelated and becomes systematic. And I don't think it's possible to stand on one leg. And I think that was the missing brick in much of the conversation and colloquy this morning.

I think that you have to face--I think all of us, not you--I think that the community has to face up to the question of, Are there limits as to the copying that a

library--many do--from the same work? It's easy to say, "Well, it's isolated and unrelated and non-systematic copying when you say, 'Well, of course, ordinarily we don't have a call for more than three or four or five copies of the same material during a given period of time--let's say during a calendar year.'" But hypothetically let's suppose you have a call not for three, four or five, but a call for a thousand, fifteen hundred, two thousand copies of the same material from the same library over that same period of time. Is that to be regarded as isolated and unrelated copying? Is that to be regarded as non-systematic copying?

The key words in the statute--and they're Delphic words and I think that it will take years of litigation to develop their meaning unless the parties themselves try, from a pragmatic point of view, to ascribe a meaning, at least temporarily to them--the key words are "isolated," "unrelated," "multiple," and "systematic." Now, how in the world is a working librarian or a library administrator to determine in a given case--always assuming you get beyond a mere handful of copying the same material--how in the world is it possible to give effect, to say that one is complying with the law and with the spirit of the law without having some sort of consensual meaning attached, if only temporarily, to these words?

CHAIRMAN FULD: Have you broached it to the other

group, the matter?

MR. LIEB: Yes, we have. I don't want to--I think that there has been too much--unfortunately--too much animosity that has developed over the course of the last year among publishers and librarians and authors. Unfortunately I think it's fairly ascribable to the fact that we've gone through a long campaign and nobody knew really what would happen when the clock struck midnight and the law became effective. And I think that there have been a lot of hard words that have been exchanged on this subject, particularly as to whether meetings should be held, whether it had been agreed not to hold them, whether they're necessary. I really don't want to go into that except to say that, as of the minute, we would very much like to engage in this kind of conversation with our counterparts among the library associations.

I also think that maybe if we could all take a deep breath and possibly under the moderatorship of CONTU or of the Register of Copyrights or of somebody or body of similar stature, I think maybe if we all took a deep breath and said, "Well, we've said hasty words to each other and about each other and that's pretty silly, we're grown people and we have a complex law dealing with a complicated subject"--not just plain law but really going to the very root of the social fabric--maybe we could make a fresh start at this. And

certainly part of that fresh start I think ought to be to try to put some flesh on these terms. And we stand ready--we would like to be able to do that. And we would hope that CONTU, in its report, would suggest some method or means by which the talks which we formerly had might be resumed.

Let me, with that preliminary comment, address myself to your recommendations. We agree with your general recommendation--Recommendation A on page 84--that no amendments with respect to photocopying to the act are desirable at this time. You said with one exception, and I'll come to that in a minute. But we agree with that general statement, and we understand that the Library Associations and the Authors League, for whom I'm--Irwin Karp tells me that I'm authorized to say that the views I express today are his and the Authors League's as well. We all I think are in agreement that there should be no amendments other than the one perhaps that you have suggested.

We also agree with your Recommendation B on page 87 that the Copyright Office is the appropriate body to review and assess all aspects of the photocopy situation, the impact of photocopying, not only on not-for-profit but on for-profit organizations, also with respect to coin-operated machines and key-operated machines, commercial copying services, anything and everything else. We think it would be very helpful if the Copyright Office addressed itself to

the whole situation.

With respect to your Recommendation C for a Section 107(b), we disagree with the recommendation and would not like to see you go forward with it and include it in your final report--this for two reasons. First, the minimum reason is we think your reasoning with respect to possible other amendments to the law with respect to photocopying is persuasive. You say that you see no need for it, that there should be a body of experience that is developed, and that in due course, at the end of five years, Miss Ringer will have her report, and at that time everything will be brought into the light and discussed, and amendments as needed will be adopted. We think that applies just as well to the problem of the copyshop.

But we have a more basic reason why we oppose the recommendation. We are not prepared to concede that a copy-shop that does copying for profit has any fair use rights. We think that it's easy to get trapped in a formula but much of the formulation, particularly in the field of copyright, depends on the background and the circumstance. It's almost hornbook law now to recognize the difference between copying that a student or a researcher did in the good old days when he did it by hand and copy that is done now by or for the researcher on a high-speed reproducing machine.

In theory, I suppose, or in a vacuum, one would say a

copy is a copy; and if you can copy it by hand, why shouldn't you make a copy by a machine that makes a thousand copies a minute? There is a difference though.

Also we think that another analogy, another reason why the bare formula breaks down is that it is generally agreed that under certain circumstances a library may make copies for its patrons. On the other hand, while it may not be agreed, at least the reservation has been expressed that very possibly a Boston Spa type library, which has as its prime purpose just the supply of copies to other libraries, should not have that privilege. We think that it's fair, by the same sort of analogy, to suggest that one goes too far to say that because somebody who needs a copy can go to a public library or an academic library to have a copy made for him, that nevertheless he can by that fact also go to a copyshop which is in the business just to produce those copies and which makes his profit from that copy and have the copy prepared for him there.

CHAIRMAN FULD: That I don't understand. If it's fair use for the requester, why isn't it--

MR. LIEB: This, I think, gets to the crux of pretty much the entire debate on copyright and of the question that remains open as to what I call on-the-premises or local copying. Is it true, is it necessarily true that because I as a researcher have a right to make a fair use copy of a piece of

material, that you as the librarian can supply me but not only a thousand others with the same material, each one of us saying we want it only for our own research use? I don't think so. The real debate, the real question, that remains unsolved and that nobody as yet is really addressing himself to--nobody in cooperation with others. They appear in the Authors League attempting to address it by unilateral statements. But the parties and CONTU are not addressing themselves to this question of, Is it true, is it necessarily so that because the user has a fair-use right, that the copier who supplies that user and a thousand other users with the same material, has a fair use right to do so. We think the language in the Senate report on pages 70 and elsewhere--on 64, I think--answers that in the negative but not clearly, somewhat cryptically.

CHAIRMAN FULD: Does not the copier fit into the shoes of the requester?

MR. LIEB: I don't think so, no. I am saying that in my opinion it does not. I'm suggesting that when a library copies a hundred or a thousand--let me really use extremities just for the illustration. When it copies for the thousandth time the same material--the Nimmer article on the right to copy--

CHAIRMAN FULD: It would be more than that.

VICE CHAIRMAN NIMMER: Are you trying to prejudice

me? [Laughter]

COMMISSIONER WEDGEWORTH: You neutralized him. [Laughter]

MR. LIEB: He's a good man to neutralize. [Laughter]

When the library makes the thousandth copy in the course of a given period of time of that same article, I don't think that that copying is either isolated or non-systematic. I think it is the oppposite of isolated, and I think it is systematic, the focal point in my view being not the requester, not the student or the researcher who comes in; the focal point of Section 108 being the copier, the library. Is it engaging in isolated copying, not does the requester ask for an isolated copy?

VICE CHAIRMAN NIMMER: Mr. Lieb, may I interject at this point a couple of points? First of all, you say that CONTU has not addressed itself to the distinction between the liability of the person actually making the copy and the person requesting the copy to be made. It seems to me that our proposed 107(b) does precisely that, maybe not to the full extent that you would like. That is, you feel that there should be no recognition of fair use for the copier. But it does very specifically indicate that there is a difference in the extent of liability and a difference in the occasion when liability will be found as between the copier and the person

requesting the copy. The mere fact that it is fair use for the person requesting the copy, it is not necessarily fair use for the copier. But going on to your point, you say in your view there is never such a thing as fair use for the commercial copier itself. May I put this question to you? Suppose you go into a commercial copyshop and you request them to reproduce for you one paragraph or one sentence, one copy of one paragraph or one sentence from a copyrighted work. Is it your conclusion that that is not fair use clearly, no matter what--I'm not asking you to say it always would be fair use. But are you saying it never would be fair use?

MR. LIEB: No. No. I don't think that the copy-shop comes within the parameters of the fair-use doctrine.

VICE CHAIRMAN NIMMER: So, it would never be fair use, in your view?

MR. LIEB: I think it's really a contractor. I think, contrary to the library--maybe 50 years ago no one would have said that the library would have a fair-use right to copy anything because the library is not a student, it doesn't write comments about other works, it doesn't prepare its own works. But it's accepted doctrine today that the library does have fair use, and I'm certainly not going to beat that dog. But I don't think that a copyshop can be equated with a library.

VICE CHAIRMAN NIMMER: But I'm not asking that.

Don't try to equate it. Just going to the copyshop itself or any commercial user, is it your thesis that if a profit is being made, if it's a commercial activity, as distinguished from a scholarly activity, there can never be fair use?

MR. LIEB: Yes. I don't see that fair use can apply to a commercial copier. I don't think the doctrine is relevant to that.

VICE CHAIRMAN NIMMER: So that, for example, a motion-picture company or a book publisher that is in the commercial activity of producing motion pictures or books, they are never in a position to claim the benefit of fair use by virtue of their incorporation of certain material from a copyrighted work?

MR. LIEB: Oh, on the contrary, that is conventional fair use.

VICE CHAIRMAN NIMMER: I'm talking about conventional fair use now. I'm asking whether a commercial copier could ever claim conventional fair use, not library fair use but conventional fair use, if there is a distinction, by virtue of--

MR. LIEB: I don't think so. I don't think so.

VICE CHAIRMAN NIMMER: Pardon me?

MR. LIEB: I don't think so.

VICE CHAIRMAN NIMMER: How do you distinguish between a commercial copyshop and a motion-picture company or

book publisher?

MR. LIEB: I think the distinction is an easy one to make. I said that with the book company or the motion-picture company--I call that conventional fair use. They are creating their own work, their own literary or artistic work--

VICE CHAIRMAN NIMMER: But they're borrowing--

MR. LIEB: --and are making use; and, within the confines of fair use, with the doctrine of fair use, are making use of another's work to elaborate on it or build on it or comment on it or parody it or whatever. That, to me, there's no problem about. But none of that is what a copy-shop does. The copyshop says, "Here I am. Come in and pay me whatever it is, and I'll make you a copy of anything you ask me to copy." It creates nothing. And, for that reason, I don't think that the doctrine has any application to it.

I am not suggesting--I don't want to be misunderstood--I am not suggesting that when they copy one line for a customer that they are guilty of infringement. I'm saying that the defense of fair use is not available. I think they're a contractor, like the plumber or the carpenter who comes in. I think that if they have--and in my view I'm not contradicting what I said before about the library because the library is the focus of 108. The copyshop is not the subject of 108. I think the copyshop gets the benefit of whatever

exemption its customer has. If the customer says, "Copy this," and there's one paragraph that comes out of such and such a book, and I tell you that's all right. I think that the copyshop is okay. I'm not suggesting you can't do that. I'm suggesting that if it is sued, it does not have a fair-use defense as such.

VICE CHAIRMAN NIMMER: But it nevertheless does have a defense?

MR. LIEB: Yes, I think so. I think that they can say, "We did this on instructions. We were told that this was permissible copying, and we did it. We aren't judges of it. We're here mechanically." But that isn't fair use.

VICE CHAIRMAN NIMMER: But that defense presumably would not be available to it if it reproduced more than a sentence or a paragraph, if it reproduced an entire book or a hundred copies of a book. And they couldn't say, "We were only following orders." The Nuremberg defense wouldn't apply.

MR. LIEB: Correct. It's difficult.

VICE CHAIRMAN NIMMER: Then why is it different?

MR. LIEB: I said it's difficult.

VICE CHAIRMAN NIMMER: Oh.

MR. LIEB: I said it's difficult. I'm nevertheless convinced that fair use should not be accorded a copyshop, and I see no reason why, particularly at this stage of the

game, that a copyshop of all people, of all organizations involved in the reproduction of material, should be picked out for a special pat on the head and given a special status, somewhat akin to the status of a non-profit library under 108. I just don't see any reason for it. We aren't asking for it. We're satisfied that if and when a suit is brought against a copyshop, it's not going to be for minimal copying; it will be for major copying. And we won't need the presumption that your subdivision (b) would give us. And I should also say we also don't think that the fact that they put a notice up is going to be of much help to anybody. We really don't see that you're giving us anything, and we think that in a sense you are enhancing their status and giving them more of a claim to copyrights than they should have.

COMMISSIONER MILLER: What about a corporate copy-shop?

MR. LIEB: We have expressed our view about corporate libraries. We think the law is pretty clear, although Dr. McKenna and we don't agree. We think that a corporate library has very limited fair-use rights. We think it's questionable whether they get the benefit of 108. And, if they do, we think that 108 rights are really not adequate for most of the large corporate libraries, which are engaged not in copying, as I understand it--making a few copies--but which on occasion need to make lots of copies. And we have

been attempting to enroll the corporate libraries in the CCC with some degree of success.

COMMISSIONER MILLER: Do you see any difference between the copyshop and the corporate library?

MR. LIEB: Oh, yes.

COMMISSIONER MILLER: Or the corporate copier without a library?

MR. LIEB: Oh, yes, big difference. Oh, yes. I think that the copyshop is at the bottom of the list. I think the corporate librarian is a librarian except he's working in a for-profit institution. I think that the copying rights that he enjoys are more restricted, narrower, than the rights of his colleague who works in a non-profit organization, but he certainly has fair-use rights and possibly 108 rights.

COMMISSIONER MILLER: Do you see a situation in which a hundred students take something for academic purposes--it may just be an article that appears on a recommended reading list or word gets around, "Hey, if you want to get an A in this cousre, you should read Smith on widgits." And those hundred people go to a copyshop in Harvard Square. That's at the bottom of the list. But if a big corporate law firm in the City of New York sends around a memo saying, "All you security lawyers should read Zilch on 10-B-5," and they all immediately call up Xerox copies

from the corporate librarian. That's higher on the list than the students?

MR. LIEB: Oh, I would say that clearly requires permission. That kind of copying, in my view, clearly requires permission and very possibly payment.

COMMISSIONER MILLER: So, we're not talking about classification of copier. We're talking about a more sophisticated mix.

MR. LIEB: I think we're talking of two different kinds of beasts. In the example you give of a corporate library or a large law office library, these are users, and they are not engaged solely in the business of saying, "Here is a machine. Give us your paper, and we'll copy it, and pay us a dollar." I think they're in entirely different classifications.

COMMISSIONER MILLER: One is guilty of original sin, and the other is--[laughter].

MR. LIEB: I'm not suggesting any sin. I'm suggesting only that a copyshop should be licensed in the copying that it does of copyrighted material; that should be paid for. We're attempting to install a system which would permit it to do that and be unsinful.

CHAIRMAN FULD: Did you want to say something?

COMMISSIONER WEDGEWORTH: Yes. I just wanted to ask Mr. Lieb a couple of questions. You stated that except for

the difference of opinion with the recommendation for an amendment, proposed 107(b), you agreed that at this point no further amendments to the law should be proposed. Is it your impression, based on what you said earlier, that the sensitivity to the concerns and problems and the relationships between authors, publishers, and librarians has been greatly increased by the dialogue that has developed leading up to the law and subsequent to its passage even though you may not have a precise agreement in the terms that you refer to? Do you think that there has been a heightened sensitivity and changes in attitude?

MR. LIEB: Of course, I do. Of course, I do.

COMMISSIONER WEDGEWORTH: I was interested in looking at the document that was produced by the AAP and the Authors League, proposed guidelines for photocopying for libraries.

MR. LIEB: Corporate libraries.

COMMISSIONER WEDGEWORTH: For corporate libraries, yes. And the first question that I really liked referred to one section, the numerical guideline number two. And what I'd like to know is, you said that you thought that the law was very clear with respect to photocopying in libraries. I'd like to know what the statutory authority is for that numerical guideline number two, which suggests that a corporate library may make no more than two copies of a copyrighted work

or from a work which it owns or one of its users'.

MR. LIEB: No, I didn't mean that that was clear. There is nothing in the statute that says that. Let me tell you how we got to that. We think that the copying rights of a corporate library are limited. We thought that it would be helpful for the parties under CONTU sponsorship to determine what the those limits should be just as the parties under CONTU sponsorship agreed on limits for interlibrary exchange of journal articles not more than five years old. That was a project that died aborning. The meetings never came about; there was no agreement. We felt it essential to fill the gap. We used our best judgment. You can fault us and say that it's poor judgment, that it's too small a number, that it's not reasonable. It was our best judgment. We indicated in the guidelines that we were offering these in the absence of a negotiated guideline limitation and that we are ready and remain ready to sit down and talk about them. Perhaps they're not reasonable. We thought that they were. But I didn't mean to say before that we find any support for the numbers in the statute. We find clear support in the statute that there have to be limitations.

COMMISSIONER WEDGEWORTH: Just following that up, if you agree that there has been a heightened sensitivity and some changes of practice and you're relying on your judgment, is there any body of evidence presently in existence

that you might use to develop such a numerical guideline that you're aware of?

MR. LIEB: No. No, I wouldn't say so. I really don't think that there is. Such experience as there is has remained personal and private and has not been disclosed.

COMMISSIONER WEDGEWORTH: Then following on your suggestion--

MR. LIEB: Wait, I gave away too much on that. I gave you too much on that. [Laughter]

That's not true because in the course of the development of the CCC, we do work with the IRI, with the Copyright Committee of the Industrial Research Institute, and did work closely with Ben Weil, who's in this room, who is employed by Exxon, and with other corporate librarians. We had some view of some of the copying or some generalizations as to the kind of copying that goes on in some corporate libraries. We weren't working entirely in the dark. But we have no accurate figures.

COMMISSIONER WEDGEWORTH: I understand that. Just one more point. Given all of that, is there really any difference in concept between your suggesting that maybe we all ought to take a deep breath and look at some of the problems and CONTU saying that we really need to give the various parties an opportunity to practice under the new law and then tackle the problems? Is there any difference in

concept?

MR. LIEB: I think so, Bob. Let me hypothetically--and we were talking before of corporate librarians, so let's stick with them because that's easiest to pin down. In this five-year period the XYZ Widgit Company can be making thousands of copies which should be paid for, which it does not report and does not pay for because its counsel says to its president and to its library administrator the law is not clear, there are no guidelines. "Who are we to determine what the limit is? Nobody knows. Let's wait until somebody takes us to court." What will happen? And I say this really philosophically, and it's not what I would hope.

What will happen, if there are no guidelines, will be that there will be litigation, and this is foolish. This is wrong, I think. But I see no alternative.

MR. LEVINE: Following up, if I may, Mr. Lieb. I was curious about the point two that Mr. Wedgeworth raised. On that, was that arrived at on the assumption that the corporate library is not within 108? Is that two figure based on fair use, or is that a 108 figure?--because if it's a 108 figure, then I don't see any distinction in this. If in fact a corporate library fits under 108, then it would seem that that two figure also applies to non-profit libraries.

MR. LIEB: It may be. The other shoe hasn't dropped yet. [Laughter]

But, you understand, that's a different test from the ILL test because the ILL test is five copies per title. This was two copies per issue, and there can be 52 issues. So, it's really entirely different, and it's not fair just to focus on two. Conceivably it could be 24, it could be whatever.

MR. LEVINE: I was wondering whether it was based on a 108 assumption, a 107 assumption or--

MR. LIEB: 108.

MR. LEVINE: 108.

MR. LIEB: 108.

MR. LEVINE: Which means then that it would apply to all libraries because there's really no--

MR. LIEB: That would be my feeling. We haven't completed our statement yet. We're still struggling with it.

VICE CHAIRMAN NIMMER: May I go back to something else?

MR. LIEB: Yes.

VICE CHAIRMAN NIMMER: Your original statement, Charles, where you speak of intralibrary or within a single library copying, you compared the situation where there is copying for three different users, none related to the other, each requesting a copy of an article, the same article. You felt that would be all right under 108. But if there 100 requests by 100 different people, not acting in concert, one with the other but all relating to the same article, it is

your conclusion that that would not be permissible under 108; is that right?

MR. LIEB: That's right.

VICE CHAIRMAN NIMMER: And looking at the language of 108(g) where it says isolated and unrelated reproduction of the same work on separate occasions is all right--I am interested in your reasoning why you think that phrase is applicable to the three but not to the one hundred. I would suppose, if the three are unrelated, then the one hundred are unrelated. Is it then that you are focusing on the word "isolated" rather than "unrelated"?

MR. LIEB: Isolated. And it depends on what that word is focused. We focus that word on the library, not on the one who makes the request. And we think that otherwise, if you're going to treat isolated--if you're going to determine isolated in the terms of the user, the requester, then there is little difference between isolated and unrelated because if both of those words, unrelated and isolated, are going to refer to the one who wants the copy, then there is not much difference between those two words, and there must have been--

VICE CHAIRMAN NIMMER: And it may be one phrase, "isolated and unrelated"--

MR. LIEB: Congress, in its ineffable wisdom, chooses its words carefully. You know that. [Laughter]

VICE CHAIRMAN NIMMER: We all know that that's not necessarily true. There is a lawyer's fiction that each word has a separate meaning and must be given a separate meaning. We know in the real world that's not necessarily true. But it certainly is a possible argument. But then the further implication of that is that when you go on in 108-(g)(1) and (2), which contrasts with isolated and unrelated, 108(g)(1) and (2), which are the opposite of that--that is, in 108(g)(1) it's related or concerted reproduction, and in 108(g)(2) it's systematic reproduction.

I take it that involved in your argument about the meaning of isolated is that 108(g)(1) and (2) do not totally represent the contrary of isolated and unrelated. (1) and (2) counter unrelated but not necessarily isolated.

MR. LIEB: We think that when you go beyond isolation, you get into systematic, under the definition contained in the Senate report.

VICE CHAIRMAN NIMMER: What is it that makes it systematic?

MR. LIEB: The definition given in the Senate report of systematic is copying which has as its purpose or effect the substitution of the copy for the printed material. That's the definition, whether you like it or not. That's on page 70.

CHAIRMAN FULD: Alice.

COMMISSIONER WILCOX: Then is there anything that isn't systematic copying?

MR. LIEB: Carol Risher asked me just in the break, "Suppose a student comes in and says that he wants one copy each of articles appearing in each of 60 magazines." In my opinion, that's clearly permissible single copying that is isolated and unrelated, not multiple, and it's permissible.

We're suggesting--more than suggesting, we believe--that there are limits on the number of copies of the same material that may be made.

COMMISSIONER WILCOX: But in the definition that you just quoted, that would say that that example was systematic too, I believe; wouldn't it?

MR. LIEB: I wouldn't think so. No. No.

COMMISSIONER WILCOX: No?

MR. LIEB: No, because that's one copy of 60 different articles. There's no possibility there that that has either the purpose or the effect of the copy taking the place of the original.

COMMISSIONER MILLER: Even if the 60 articles had been packaged and published in an anthology of selected articles on the law of--

MR. LIEB: I did not say that, Professor, no. I didn't say that. I was giving an example of 60 different journals. No, it couldn't be if it were in the same

anthology because then clearly it would be covered. That's (d) subject to the limitation in (g), in (g)(2).

VICE CHAIRMAN NIMMER: Of course your definition of aggregate there in the statute relates to interlibrary, right, not to intralibrary?

MR. LIEB: I'll say something else. I think the proviso that was put in was really suspenders added to a belt. I don't think the proviso, in my analysis, adds anything. I think that when the proviso says--

VICE CHAIRMAN NIMMER: I thought it was your premise that every word in the statute counts and there is no redundancy. [Laughter]

MR. LIEB: Mr. Wedgeworth and Dr. McKenna wanted this, but I think that what it says is clearly correct; but it would be correct even if it weren't in there to say it, under our definition of systematic.

Shall I continue?

MR. APPLEBAUM: May I ask one further question? Is your premise then that every library should maintain a working list of every single that it is ever asked to copy on the grounds that at some point it will reach the number where it's systematic?

MR. LIEB: No. The reason that we offer--I think that we are proposing to offer as an alternative to academic libraries this rule of two, and the number is subject to

change--is that here the notation can be made on the article itself. You don't need any records. If, as distinguished from the ILL test, which is something from the title--and there might be 52 issues in the title--if now we say you can't make more than x-copies of any particular article, all you have to do is to check it off. Put the date on, April 18th or whatever it is, and you know that you made one copy on April 18th. And you make another copy of July 3rd, and you make another copy on November 1st. Then you know you've made three copies. Whether it's practicable, I don't know. But no, we're not suggesting that.

Also we think that the vast majority of libraries don't get caught in this problem. We think that the vast majority of libraries don't do any copying. They have machines on the floor. So, we're talking, I think, of a relatively small group, relatively small group of libraries, which has this problem.

COMMISSIONER WILCOX: I suggest that your last statement is probably true because the economics are such that it costs too much to copy, and it's cheaper to buy. Some of your earlier examples just baffled me, to think that anybody would spend the time to make all these copies when it would be so much easier to buy it. I think perhaps it's more attuned to good economic practices than might have been suggested in your remarks.

MR. LIEB: No, I'm not expressing myself on that. I'm not suggesting that they're poor practices. I'm using examples--and I said extreme examples--to attempt to illustrate a kind of complex legal point. I'm not suggesting that any librarian is making a thousand copies of the same article.

On Recommendation E on page 93, with respect to journal publishers, we agree with your objective, but we think that you have overlooked several points of law. You're assuming in the discussion--and I'll get the staff a copy of the pages at which the remarks are made--you're assuming, first of all that--you're assuming three things which are either incorrect or only partially correct. One, that if a journal is not registered for copyright, it is not protected by copyright, which of course is not correct. So, all of your remarks about journal publishers not registering copyright--at least the first term--are I think irrelevant. They become directly relevant when you talk about second term, because you have to register the first term to get your renewal the second term. But whether copyright is registered has nothing to do with whether the work is protected.

Secondly, you're assuming that when a journal is published without a copyright notice, that that is necessarily a clear field for the one who copies as an innocent infringer. That's correct but only partially correct because the statute--

I think it's 408(b) says that although the innocent infringer is relieved from statutory and actual damages, nevertheless the court may hold him responsible for profits he has recovered and may also enjoin him in further copy.

Third, and maybe this is the more difficult one of the three, you're entirely right in saying that there is something wrong with a system where nobody knows how far back copyright goes. But I don't think that you accomplish your purpose under this new statute by just looking to the copyright on the journal. You're forgetting that the individual articles are in separate copyright or may be in separate copyright; and the fact that the journal is out of copyright because it did not renew its copyright does not at all mean that the articles that you want to copy are not still in renewal term. So, we accept your comments, and we sympathize with them, and we will try to work them out. But we don't think as yet that we've got the right answer. I think the basic thing is the copyright on the article, and we're going to have to figure out some way to advise people who use it how far back the article copyright goes, not the journal copyright.

I have only a few more minutes.

COMMISSIONER WEDGEWORTH: Mr. Lieb, could I just ask a question about that while it's pertinent?

MR. LIEB: Surely.

COMMISSIONER WEDGEWORTH: On the sample questions, again in your document on corporate photocopying, question number 28 refers to the notice of copyright which ought to appear. And I find that to be--I find it difficult to relate what you just said with the recommended answer to that question because my understanding of what you just said is that there are several complex questions that you would have to ask in order to determine whether a given item were under copyright. And your question number 28 says: "What notice of copyright must be included on photocopies made by libraries under 108?" And the answer is: "The same notice of copyright that applies to the original work," which suggests that you may have to conduct a research project to find out whether a given item may be under copyright.

MR. LIEB: Difficult question, Bob. I think that, in a way, we were responding to a unilateral statement which, although we understood it, from the Library Associations, we felt was not justified. The associations have advised their membership that all that need be said under 108 is that this work may be copyrighted. We understand the reasons for that because you're not supposed to be a copyright expert. On the other hand, the statute says copyright notice. We think this is something that has to be worked out among the parties, but we can't do it alone. We think that the associations' advice is not correct. And I think we're aware that ours is, in

many instances, not workable. There has to be a solution to it. You take a case where you make a copy of my article, and my article says, "Copyright, Lieb, 1977," then we think that for obvious reasons that ought to be reproduced, probably would be, because it's on the article itself and you're making the copy of it.

COMMISSIONER WEDGEWORTH: Let me make just one brief comment. I think that those statements are very understandable. What distresses me after hearing it though, is that a document which is being circulated suggesting guidelines based on what you said to here is really a political document and not in fact guidelines at all.

MR. LIEB: I don't think that's fair. Now, wait. That really isn't so. We have said in that document that we thought that the preparation of guidelines should be done cooperatively, should be a mutual effort, that we were unable to obtain cooperation. Therefore, we had to proceed unilaterally, and these are the suggestions we make until the parties agree on something else. That seems to me fair enough--and particularly fair enough because nobody is accepting our statement as the word of God. I'm told that there are suggestions made within the library community that it's not entirely accurate.

COMMISSIONER WEDGEWORTH: You obviously understand my point because you agree that there has been a systematic

movement during the whole process of this, by copyright proprietors and librarians alike, that there are no clear answers in terms of evidence that you could use on which to base that. There is no clear statutory authority. And you recognize that many of the suggestions you made are impractical, and I have no other conclusion to draw than this.

MR. LIEB: I said impractical. Maybe again I gave too much away. I didn't really mean impractical. What I had in mind was the difficulty of applying the copyright notice requirement to a work which doesn't carry a notice or where the notice is not easily found.

On the other hand, I very clearly mean that where there is a notice, it should be reproduced.

MR. LEVINE: Is part of your difficulty there the fact that if in fact your interpretation of the statute is right, that it requires the copyright notice--and if the association or an individual publisher says, "Yes, you may merely stamp on what the Library Association suggests," that you may in fact be invalidating your copyright in some fashion?

MR. LIEB: Yes, that's part of it.

MR. LEVINE: And I wonder, as a corollary to that whether if in fact the law stated that all that was required was a statement that the work may be under copyright --if that was permitted by the statute, would that give the

Publishers and Authors Association difficulty?

MR. LIEB: It would be unfortunate to reduce all copying to that treatment because it's desirable from everybody's point of view that where the notice is available, it be reproduced. So that the fellow who has the copy can know where he can get further permission, can know from whom he can get permission to make more copies. He should know who owns the copyright, if it is reasonably practical for the notice to be reproduced. Maybe that's the way the statute should read.

MR. LEVINE: If the notice is on the page that is being copied, then that obviously would be--

MR. LIEB: Yes.

VICE CHAIRMAN NIMMER: But, Charles, if there isn't a separate notice in the article, then presumably the applicable notice is the notice for the periodical itself, right?

MR. LIEB: Not under the new statute, no.

VICE CHAIRMAN NIMMER: There is no other notice.

MR. LIEB: There doesn't have to be because 201, 202, whatever it is, says that the notice on the journal protects the article.

VICE CHAIRMAN NIMMER: I agree. But that is the notice that is to be reproduced, isn't it? Or are you saying they should compose a new notice?

MR. LIEB: But that notice doesn't determine the term of the protection of the article. It merely says it protects the article. The term--if, for example, if the journal is--and we're really going pretty far--if the journal is a work made for hire and has a 75-year term and if the article is written by you and you live to be 108, your protection on that article goes for 50 years thereafter. So that the terms run out at different times.

VICE CHAIRMAN NIMMER: Right. But that is an inherent problem under the new law, with a term based on the author, but the notice doesn't ask for the author's birthday. That's true whether you have a journal or just a separate work. You can't tell when it's going to run out if it's a work created after the effective date of the new law and it's not a work for hire, et cetera.

COMMISSIONER MILLER: It's a practical matter. Mel is suggesting, I guess, that the periodical notice is the only game in town.

VICE CHAIRMAN NIMMER: Yes.

MR. LIEB: I thought you were going to say the other thing, that the name of the author, the contributor, is the only game in town, and that you have to find out--

VICE CHAIRMAN NIMMER: That's not the notice.

MR. LIEB: You have to find out whether he's dead and when he died.

VICE CHAIRMAN NIMMER: Charles, that would be more rational maybe, but that's clearly not what the statute calls for.

MR. LIEB: Correct. Correct.

COMMISSIONER WEDGEWORTH: I think implicit in the recommended statement that the Library Associations came up was simply a recognition of the difficulties you've laid out; and you're saying that shouldn't be true but there is no alternative that is readily available. I think if there were an alternative, that certainly would be a point that could be taken into consideration.

MR. LIEB: Maybe the notice copyright is claimed in this work--I mean, one of your problems maybe was that you didn't want to be a copyright expert to have to determine whether there was good copyright.

COMMISSIONER WEDGEWORTH: A copyright may be claimed?

MR. LIEB: No, not maybe, is claimed.

COMMISSIONER WEDGEWORTH: But that would frequently be inaccurate.

VICE CHAIRMAN NIMMER: If there is a notice, it is accurate, isn't it? If there is a notice somewhere in the publication--

COMMISSIONER WEDGEWORTH: If there isn't a notice.

VICE CHAIRMAN NIMMER: Then you don't have to,

under the statute. I would say you don't have to put a notice. That may be debatable, but--

COMMISSIONER WEDGEWORTH: So, you'd have to know one way or the other.

VICE CHAIRMAN NIMMER: Whether there's a notice in the magazine.

COMMISSIONER WEDGEWORTH: Yes.

VICE CHAIRMAN NIMMER: But you don't have to reproduce the notice.

MR. LIEB: I m almost at the end.

CHAIRMAN FULD: Good.

MR. HERSEY: May I interject, Mr. Chairman, that I would only remark that the last few minutes of discussion seem to me to bear out the suggestion that there is a need for clarification and definition of these terms.

MR. LIEB: Your recommendation F to government agencies, we support the suggestions you make to government agencies. But we would hope that you would also suggest or recommend that all agencies follow the policy adopted by the Department of Agriculture and announce their intention to make copies under the limitations and within the scope of Section 107 and 108 of the copyright law. This is more important maybe than it might seem. The government has one of two ways to go. As was mentioned earlier this morning, under 1498(b) of the Judicial Code, the government in effect has a compulsory

license for itself and for its contractors. Government can go one of two ways. It can say, "We will comply with the marketplace practices and obtain permission where it's possible, or we'll turn our back on the marketplace and we'll just copy and let them sue us." And I think this is a matter of major national policy which you should address. I think that's of major importance.

Finally we plan to suggest to the Copyright Office that it use its authority under Section 408(c)(1) to provide in their regulations that periodical issues published within a given period of time--let's say quarterly or six months or even annually--may be registered with a single registration, by a single registration, as parts of a group of a related work. And if you think well of this, we would ask that you would perhaps join in that recommendation.

In closing, as I said before, I was authorized by Mr. Karp to say that at least most of the views I express are the views of the Authors League. I'd like also to add a personal note in behalf of AAP and myself that although as you may have gathered, we have not always agreed with your views and have sometimes chafed under your hard questioning, and we've never hesitated to indicate that we've felt it--nevertheless, we appreciate the opportunities that you have given us, and we thank you for your unfailing courtesy and patience and good humor. Thank you.

CHAIRMAN FULD: Are there any more questions? Dan.

COMMISSIONER LACY: One sort of remark that I'd like to make, not exactly a question, and back to the business of guidelines, Charles. It seems to me that there are difficulties in developing further guidelines that we haven't explored, and I'd like to take the opportunity to set forth what at least have been my reasons for feeling this was not a very fruitful course to pursue at the moment, which may not be the reasons of other commissioners.

In the case in which CONTU did take the lead in developing an agreement on guidelines, the five copies within five years, the language of the statute invited a quantitative numerical figure because it said in such aggreggate quantities as can--and the question was, What quantity is that? It invited a number.

Many of the other terms that we discussed--isolated, multiple, unrelated, systematic--do not invite necessarily a numerical answer. One would suppose that if any two copies were related or concerted, their unlicensed making would be unlawful. One would question whether CONTU or anybody else has authority, however, to produce a guideline that says a hundred isolated and unrelated, if indeed they were isolated and unrelated, were illegal. Just the mere number doesn't constitute a relationship nor, it seems to me, overcome a presumption of isolation if indeed they were isolated, one

from another. Isolated doesn't mean few. It expresses a relation between two different things, and there may be 5,000 things each isolated from each other.

And it seems to me these words are not as naked and undefined as we think. The congressional committees went to some length in their glosses on the act to define these, and I've felt it somewhat difficult to say more than they've said. I think necessarily some ambiguities in the word "fair use" necessarily exist because if you--it would be very difficult for me to conceive of a specific number that we could put in where 49 were isolated but 50 weren't or 49 might be isolated but 50 certainly weren't or whether that number was a thousand or whether it was 25, which wouldn't either make illegal some obviously legal practices or, conversely, legalize things that weren't legal. It just seems to me it doesn't--like fair use itself--it doesn't lend itself very easily to specific numbers. And I think these difficulties--some of them are just inherent in the law. I regret some parts of the law. I think in some things they do permit the law itself is deficient. But I think there may be real difficulties in trying to amend the law by guidelines which I suspect some people would like to do on both sides of the debate.

And I really suspect that in any event, in most cases we are dealing with issues that lie almost by definition, if we're worrying about minutiae of definition, we're dealing

with things that lie on the debatable borderline, that there probably does exist with respect to the overwhelming majority of cases of copying a consensus that this big mass are lawful under the new law and that this big mass are not, and that the primary goal we could all seek jointly would be to try to stop that that's conceded all sides to be unlawful or without a license or, alternatively and on the other side of the picture, to make licensing easy. And I've noted with regret the editorial in the Library Journal a couple weeks ago that spoke of the copyright fight being reopened with bitterness and so on, which I think was an exaggerated statement.

But what has in fact impressed me has been the extraordinary effort and good faith of the author and publishers groups in attempting to establish a really simple and useful method of gaining permission in those cases that do require a license. And I've regretted that that seems to have been misunderstood sometimes as a policing or enforcing or an extension of claims. And on the other side of the picture I have been really impressed with what had seemed to me the good faith of the library community generally in trying to obtain a good faith compliance with what we've all agreed on are the parts of the law that are the areas that are clearly illegal without permission. And it seemed to me that the real--and I say this not really addressed to your

testimony but just because this may the last time as a general discussion of this whole thing before the Commission--that the most constructive thing we could all do would be to recognize that whatever the differences of opinion, the good faith that both sides have shown in this in an attempt to move forward in the next five years with a genuine effort to work together and to ultimately produce in the five-year review a further perfection of the law.

MR. LIEB: May I just respond? I think that it is just as easy and just as difficult to quantify systematic copying as it is to quantify interlibrary copying. The common denominator is that the purpose or effect is to substitute with respect to interlibrary the words I used in the statute and with respect to local copying and other copying the words I used in the Senate report, the same words. And I think the problem is exactly the same, and I see no reason why, if it's possible to quantify in one case, it should not be possible to quantify, possibly with different numbers, in the other case.

COMMISSIONER LACY: I don't mean to prolong the debate. I would think that systematic depends on the system, not on the quantity. If a library as one corporate library--and assume for the moment that corporate library was entitled to 108 privileges--issued a statement to all employees that the library, the corporation, would no longer pay for

subscriptions for individual offices or units for any of the following 85 publications because people could get copies from the library which would provide them, I would say that making any copy, any copy at all, the first copy, was a violation of law under that because that's the system. What makes it illegal is the system they set up, not the number of copies made. Absent such a system or intent, doing 30 copies would perhaps not be a violation. I really do think there is a good question.

VICE CHAIRMAN NIMMER: Pursuing Dan's line of reasoning, just one final question. Would you say it is a contradiction in terms, Charles, to speak of in the wilds of Northern Canada there are 5,000 isolated farms; is that inherently contradictory? If there are 5,000, is it impossible that they are isolated?

MR. LIEB: No. That's not entirely cricket. To whom is the word "isolated" addressed? That's, I think, the real question. Is it addressed to the user who wants the copies or is it addressed to the copier who makes the copies? If it's, as we say, addressed to the copier who makes the copies, then after he has made more than x-number of copies of the same material, that is no longer isolated copying. The fellow who gets in last is too bad because the library has gone over its quota. It is now engaged in non-isolated and systematic copying.

COMMISSIONER MILLER: That logic would extend to an unsupervised machine.

MR. LIEB: No, because there is an absolute exemption on an unsupervised machine provided only the caveat is posted. There is no responsibility that a 108 library has. We've said--and the House report says--that the corporate library doesn't have that exemption. But addressing ourselves now to the academic library, there is no liability for infringements occurring, no liability on the part of the library for infringements occurring on the floor machine, unsupervised machine.

COMMISSIONER MILLER: What about liability on the renter of the unsupervised machines who systematically puts in machines in locales where over time you're going to get more of an impact on that machine than you'd get through the library and perhaps even at a copy center two blocks away from the library.

MR. LIEB: What do you mean by the renter; the library itself is the renter? Who are you referring to?

COMMISSIONER MILLER: The Harvard Law School. I say to my class of 140 in copyright, "Get ye forth and xerox Nimmer"; all right? [Laughter]

The library is not doing anything. It's Boston. It's snowy. So, they go to the library, pull the volume off, go to an unsupervised machine in sequence. The impact as far

as the publisher, the author, is exactly the same. It's not a library--

MR. LIEB: Agreed. But the library is not responsible under the specific exemption. The students are responsible, and maybe you are as a vicarious infringer.

CHAIRMAN FULD: That's a good note on which to conclude. [Laughter]

COMMISSIONER MILLER: No one has ever accused me of being responsible. [Laughter]

CHAIRMAN FULD: Thank you, Mr. Lieb.

It's now around 3:30. In view of the statements made today, we believe it's desirable to have the Photocopy Subcommittee meet now along with other members of the Commission and consider suggestions and criticisms conveyed to us. Accordingly we conclude this session, and we'll recess until 9:30 tomorrow morning--9:30 instead of 10:00 o'clock as indicated in the agenda. We welcome you back tomorrow.

[The session was recessed at 3:35 p.m.]

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NATIONAL COMMISSION ON NEW TECHNOLOGICAL

USES OF COPYRIGHTED WORKS

Twenty-first Meeting

Wilson Room
Library of Congress
Washington, D.C.

April 20-21, 1978

Friday, April 21, 1978
9:43 o'clock a.m.

Commissioners Present:

Judge Stanley H. Fuld, Chairman
Dr. Melville B. Nimmer, Vice Chairman
Mr. George D. Cary
Mr. John Hersey
Mr. Dan Lacy
Dr. Arthur R. Miller
Mr. E. Gabriel Perle
Mr. Hershel B. Sarbin
Ms. Alice E. Wilcox
Mr. Edmund L. Applebaum, for the
Librarian of Congress

Staff Present:

Arthur J. Levine, Executive Director
Robert W. Frase, Assistant Executive Director/Economist
Michael S. Keplinger, Assistant Executive Director
Jeffrey L. Squires, Staff Attorney
Christopher A. Meyer, Staff Attorney
David Y. Peyton, Policy Analyst
Patricia T. Barber, Librarian Analyst
Dolores K. Dougherty, Administrative Officer

C O N T E N T S

P R O C E E D I N G S

CHAIRMAN FULD: I call to order today's meeting. We plan to discuss today the New Works Subcommittee report and the Software Subcommittee report. I call on Mr. Squires to give us a rundown on the New Works Subcommittee report.

MR. SQUIRES: The four members of the New Works Subcommittee--there were originally four. Mr. Dix was a member of the committee. Mr. Miller joined the committee along with Mr. Sarbin and Miss Karpatkin. This report is the work of them, in conjunction with the staff.

The basic concern is whether or not there can be a work that might be submitted for registration, copyright, or in which one might claim copyright that would be the product of a computer operation, the computer operation being independent of the amount of human input necessary to qualify the work as a writing under the Constitution. As the report indicates, this concern was recognized by the Register of Copyright over ten years ago. And it is really the issue that was addressed in the report.

What the committee tried to do was to understand how a computer is used to create a work, whether it be as an implement or the sole device responsible for a work in which copyright might be claimed, and then to ascertain where in that computer operation or in the inputs that go into the ultimate work, where vests the requisite human authorship to

entitle the work to copyright. And so we looked at a computer operation--and as we've talked about it--in the area of data bases and software. A computer is operated under the control of an individual, perhaps under the control of a program that directs the operations that the computer performs. Individuals seated at panels operating the controls, the program, have some role in many computer operations and the program itself. And we tried breaking these separate inputs down. We employed some sort of a process of elimination.

The creator of a data base doesn't play a creative role in a work that is the result of a computer operation because the data base is really passive, stored information that the computer operation employs or is employed in the course of a computer operation.

The more difficult question is what attributes the program or programmer might have of authorship in a resulting work. And it is conceived that a computer programmer who creates a program that controls a computer in a specific operation or perhaps a specific pre-specified set of operations to produce a work is probably the creator in some sense of the ultimate work because there was something envisaged that the program was created in order to produce. And in such a case the resultant work would be a work of authorship, and it would be the work--at least one of

the creative inputs would be that of the programmer, and the programmer would have an author's interest in the ultimate work.

It is envisaged that a program could be created, a general purpose program to perform a repetitive operation on a body of data that might not qualify the creator of the program as an author because there was no specific output envisaged at the time the program was created.

I might suggest that if a programmer created a program to manipulate statistical information--say a telephone directory--if one could create a computer program and feed into it all the information in a standardized telephone directory format to do something, to manipulate, to change the order, to make a criss-cross out of a general telephone directory, and this program could do this forever, perhaps the outcome would not be a copyrightable work because the programmer had not really envisaged any final output. He had only created a program to perform a certain systematized function.

The converse--to consider the programmer a creative author in that situation would be, I think, necessarily to imply from that that you could operate that program for 150 years, that everything that was the result of the operation of that program would be a copyrightable work attributable to the author 150 years--why use a finite term?--forever; and that

the work that that programmer had done at one point in time would result in the attribution of copyright and proprietorship to that individual forever. And that comes into conflict, I think, with the constitutional policy of limiting the duration of copyright entitlement. And that is the subcommittee's view.

Ultimately it is also the subcommittee's concern that the creator of a programmer might attain a type of monopoly control over the system that the program is employed to perform, the function that the program is employed to perform, if a general purpose program at the extreme example could be employed to manipulate all of the letters in the alphabet in an infinite number of manipulations so as to perhaps create every possible arrangement and organization of the symbols we use with which to communicate, and that that would be an inappropriate right to vest in any individual.

The solution that the subcommittee reached is intended to shortstop that type of eventuality and still to acknowledge that those people who use a computer in order to assist them in the creation of a work to perform functions that would otherwise be impossible or impracticable should be entitled to claim copyright, that the incentive provided by copyright is desirable in that area of operation.

Ultimately there are fact-finding roles that courts may have to make in determining whether or not there was

sufficient creative input at some aspect of the process to vest copyright in an individual or organization employing the individual. But the subcommittee sees no path to take other than to acknowledge the existence of that ultimate fact-finding function at some time and to make the recommendations it has.

CHAIRMAN FULD: I wonder if I may ask Jeff something that is not clear to me. It probably is to most of the others.

MR. SQUIRES: It probably is not.

CHAIRMAN FULD: I have a question on pages 13, 15, and 20, just a question of understanding the impact of this. The first sentence on 13--you may have treated it now, but I wasn't able to deduce, get an answer to what's troubling me. "Difficult questions are raised, however, when the program is a general purpose one that can operate upon any of a variety of data stores to produce works not specifically envisioned or intended by the initial programmer." What does that mean? What consequence is worrisome? Or is it so clear to you that it doesn't require--

MR. SQUIRES: I don't know that any of this is so clear to any of the subcommittee or myself, Judge Fuld. What we are trying to suggest, I think, is that unless the programmer, the person who would claim the entitlement through his creative efforts to copyright of an ultimate work--unless there is a specific work in mind at the time the program was created, the program to operate the machine, to implement the

directions the programmer wishes to introduce into the process, that perhaps the creative element, the creative relationship, between author and work would not exist.

CHAIRMAN FULD: Is that a common practice to do the--

MR. SQUIRES: None of this, none of the work of the subcommittee is really directed to assessing what is common practice today. I don't think it is proper to term the area speculative anymore. But the use of the computer is still, in the creation of works--

CHAIRMAN FULD: But, I mean, this is something which is within a reasonable contemplation of what might happen?

MR. SQUIRES: I think so.

CHAIRMAN FULD: That a program would be produced for that purpose?

MR. SQUIRES: I think so. Especially the indexing and abstracting functions that are performed with the assistance of computers today.

CHAIRMAN FULD: Now I'll continue with these two other things, if I may, before the others ask questions. On page 15, the second sentence: "It would be impractical, if not impossible, to establish the date of 'creation' of a work, in order to determine the period of protection, if the creative efforts were attributed solely to the creation of a

program that could be employed to operate a machine and produce numerous works over a period of many years."

MR. SQUIRES: That's the example that I tried to suggest--the possibility that there might be an infinite term of protection attributed to the initial programming efforts of a programmer in that the work spawned by the use of that program forever could be attributed--copyright in those could be attributed to the efforts of the initial programmer.

CHAIRMAN FULD: You mean there would be different terminal dates, depending on who uses them, who makes use of them?

MR. SQUIRES: If you were to attribute the creative element to the programmer, would you, for example, 150 years hence grant a new term of copyright protection to a work created with the use of that program--would you attribute authorship to the programmer and then give the right to the fifth generation succeeding him that was alive at the time?

CHAIRMAN FULD: And that is sufficiently possible, realistic?

MR. SQUIRES: I don't know that speculative is the right term, but I don't know that practical reality suggests that these are likely occurrences.

VICE CHAIRMAN NIMMER: In so far as we're dealing with the new term of life of the author, plus 50 years, that

wouldn't arise, would it, unless you regard it as a work made for hire or an anonymous or pseudonymous work? Otherwise, it's life plus fifty.

MR. SQUIRES: Agreed,

but you get into a difficult distinction between the program and the work spawned by the program. We're not talking about copyright in the program itself now.

VICE CHAIRMAN NIMMER: I understand, and I don't disagree with your conclusion. I like the line you've drawn. But in so far as your concern with perpetual protection, if the term is life plus fifty, then even if one were to attribute to the author of the program the resulting work, still 50 years after the death of the author--

MR. SQUIRES: It creates a real anomaly, in a sense, because you're right. And how do you give any sort of protection to the resultant work if you don't have the author's life to measure it by anymore? I hadn't thought of it.

COMMISSIONER LACY: You'd be saying that the work was not only posthumously published but posthumously created.

MR. SQUIRES: Exactly, yes.

VICE CHAIRMAN NIMMER: But the new law does not create a special term for posthumous works.

CHAIRMAN FULD: And the last one, which is probably just as simple, is on page 20: "Some works created by

computer applications may not be copyrightable. Such works, derived from the operation of a general purpose program on predetermined data, would not appear to bear the direct expression of human creative effort justifying copyright."

MR. SQUIRES: You would like an example of that?

CHAIRMAN FULD: Yes.

What relationship does that have with the report of the Software Subcommittee?

MR. KEPLINGER: May I offer a suggestion, an example, that might illustrate that? If you have a computer program to perform a complex mathematical computation such that the ultimate output produced by the program is simply a number answer--if you instruct a computer program to evaluate a certain formula to calculate the density of iron and you input the data that the program requires and the output is solely a printed line that says, ".4623897." Such a work would not be copyrightable work.

COMMISSIONER LACY: But it wouldn't be copyrightable if a human being had done the calculation with a pencil.

MR. KEPLINGER: That's right.

COMMISSIONER LACY: It has nothing to do with the computer. It's not a work.

CHAIRMAN FULD: It should not be expanded to make more clear to one not as familiar--

MR. SQUIRES: There's more to it than just that.

CHAIRMAN FULD: I beg your pardon?

MR. SQUIRES: I think there's more to it than just that because you asked another question: What's the relationship of this to the work of the Software Subcommittee?

CHAIRMAN FULD: The explanation given by Mike certainly makes a different situation.

MR. KEPLINGER: That's a very simple case.

MR. SQUIRES: It seems to me that there is no necessary intertwining between the work of the Software Subcommittee and this committee on this issue because we're not talking about ownership of the program itself, copyright entitlement in the program, but in separate work. And the example that I would think it would suggest, other than the one Mike might suggest, is the work that on its face might be entitled to copyright, and that's why these are the more difficult questions.

What if McGraw-Hill--this is unfair and I'm a little hesitant to do this because I'm certain it can be turned around on its head--had a computer program that performed certain statistical manipulations on a semiannual report done by the Bureau of the Budget. And as long as the Bureau of the Budget report kept the same format, it didn't matter what the statistics were, but the McGraw-Hill program would manipulate those statistics and come out with an economic analysis. It would manipulate the statistics and produce different

statistical information for a purpose that was of interest to someone, and it could do that forever. I am not sure if a human being did that, you might say it was copyrightable.

CHAIRMAN FULD: These two sentences seem very cryptic to me and seem to encompass more than the example each of you has given. I would think it would have to be, for a reader such as myself, it would have to be made more specific.

COMMISSIONER PERLE: Several things troubled me about the report. One of them is that I had no context, factual context, to which to relate the report. I don't know what you mean by new works. For example, I take it that if I were to ask a computer with a program and a data base to write a song for me, we would then have a new work; is that right? And then we could ask whether or not it was copyrightable.

There are a couple of things where computer technology is currently used, and I don't know if you think of these as new works. First, somebody creates a pattern for a dress or a suit in the garment business. And there are computer programs which will take size 38 or whatever the basic size is and do all the computations and give you a picture of the new pattern in size 42 short, in size 38 long, and all the other sizes. Are those new works in your lexicon?

MR. SQUIRES: No.

COMMISSIONER PERLE: They're derivative works?

MR. SQUIRES: Are you talking about the dress design and the dresses themselves or a layout on a computer screen?

COMMISSIONER PERLE: Let's say there is a set of templets for the sleeve, the jacket, the lapel, and all the rest of it. They're drawn. There's a copyright notice on it. It's quite clear to me that it's copyrightable, the original one. The machine, the computer, takes that one and prints out or projects on a screen from which a printout can be made all the dimensions of a different size. And that's fixed, becomes fixed, and that's what's actually used for cutting the cloth to make the suit that you're wearing. Is each of those different sizes a new work, each of those drawings? I just want to know what factual context you're in.

I would say no, for the purposes of this subcommittee. I would say that should not be regarded as new work but rather derivative work because it's merely taking that which is and making it somewhat different, and it could not exist without the original copyrighted work.

VICE CHAIRMAN NIMMER: Gabe, may I interject that it's my understanding that the problem we're faced with here really goes to whenever a work that would be copyrightable if a human being had done it, the issue is if it's created with the assistance of a computer, should that derogate from

its copyrightability? If that is the issue, I don't think there is any meaningful distinction between whether it's a derivative work or a work that is not based upon a prior work.

COMMISSIONER PERLE: I just want to find out what we're talking about. For example, the other thing that's in current use right now is if I a figure, Mickey Mouse--as we all know, we can have an animation of that. We can sell that figure to walk. And the program will give you all the frames you can photograph, and you project it on the screen, and you have an animation of Mickey Mouse walking. Is that what you call a new work? Is each of those new frames a new work?

MR. SQUIRES: I think it could be. I'd love to have anybody else, members of the subcommittee or otherwise, respond. I think yes, Gabe, it seems to me that that could be a new--

COMMISSIONER PERLE: The reason I'm asking is that if we're to do a meaningful job here in terms of new works, I think we at least have to let the Congress know what we are talking about. And at this stage of the game, I don't get from this report what it is that we're talking about.

VICE CHAIRMAN NIMMER: I think you're right, that some clarification on that point is required, and correct me if anyone disagrees. But it seems to me what we're saying is,

when we talk about a new work, the definition of a new work is really no different than if a human being is involved. What we're talking about is a copyrightable work, whether it's a copyrightable work based upon a prior work and therefore a derivative work, or whether it's purely new material. The only new issue here is a computer was used in arriving at that new work; and does that then mean that you can't claim copyright in it?

COMMISSIONER PERLE: I totally buy it, and I think it has to be in the report.

COMMISSIONER SARBIN: It would be quite useful, I think, even if it were done as a footnote in the report, to explain how in a particular instance if something were done by a human being and extend that example, that would or would not be copyrightable, and to really then move over and have the assistance of the computer doing the same thing. That kind of parallel at least makes it understandable, and I don't think we did that.

COMMISSIONER MILLER: You look at me as if I'm guilty as charged.

COMMISSIONER SARBIN: You, sir, were masterful in all of this--

COMMISSIONER MILLER: In producing a lousy report that Gabe has now ripped to shreds.

COMMISSIONER SARBIN: No way.

COMMISSIONER HERSEY: I would like to raise one question in connection with what Gabe has asked, because it is the one question that I wanted to raise about the report as a whole. It seems to me that the issue of the altered suit templates is like one that I have thought of. Lowell North, one of the competitors for the Americas Cup skipper role last summer, does all his sail cutting by computer. He calculates the performance of the sail in relation to aero-dynamic conditions from day to day and alters his sails by computer from day to day. The cutting of the sails is done by computer program into which he can feed new information to alter the shape of the spinnaker or the mainsail or whatever. And that seems to me to point to a question about a sentence on page 14 of the proposed report, about two-thirds of the way down the page: "This would not preclude copyright in a work created by the application of a program which was modified to produce a distinct work based on the creative efforts involved in the modification."

This seems to me to be close to the serious question that I have about the issue of adaptation in the Software Subcommittee report. Does this mean that any number of modifications can be introduced into a program and that each work then created would be copyrightable? Does it mean that modifications could be introduced into the program itself so that it would perpetuate changes, depending on

passage of time and so on?

COMMISSIONER MILLER: This is part of the larger question which I believe I addressed--it seems as if it were years ago--of one of the potential horribles created by the dimensional change of production by machine versus production by pure human effort, of programming a computer to produce an endless stream of couplets or quatrains or limericks or sonnets based on a pre-established data base of all words dealing with a particular subject, with a potential of copyright monopolization of all combinations of all words dealing with that subject. Quite clearly that is a theoretical risk and probably no more than a theoretical risk.

You were adding to that, I take it, John, the potential of producing a large number of works based on almost trivial modifications of the program. And I take it the concern might be monopolization of the range of trivial variations. I take it the answer to that in part is that it may not be a question of copyrightability as much as it's a question of scope of protection.

In other words, if you recognize a copyright in the array of sales that he produces by manipulation of the underlying program to produce the cutting, the question first would be, Does that prevent anyone else from doing exactly the same thing? And the answer is, "Hell, no" because all you're doing is applying public domain, mathematical or

physical formulae and producing a result.

I take it also that an alternative mode of analysis would be the kind of analysis that at least two courts of appeals have used in suggesting that when the output is sort of preordained, either by natural law or because of paucity of capacity of the English language to describe something in more than a limited number of ways, you either don't recognize the copyright or you recognize it as a wafer-thin copyright, and you permit other people to use virtually identical language or produce identical sales.

So, I think the answer to the fear you expressed, which is a fear I have expressed to the subcommittee, is that, one, though theoretical, it's unreal. Second, it doesn't really prevent anyone else from doing exactly the same thing. And, third, a smart court, understanding the social cost of recognizing any sort of a monopoly, will simply back away and either say, "Hell, no, not this case," or will say, "The scope of protection is so miniscule as to prevent no one else from doing the same thing."

COMMISSIONER HERSEY: Then my question would be, What does this sentence mean? What is the purpose of opening the way for this kind of modification? And, if it's a more limited opening, should not that be made clear?

COMMISSIONER MILLER: This may be like the last point, a context in which explication is needed to maybe spell out

some of the thoughts I've expressed.

COMMISSIONER HERSEY: What does this mean? May I understand it?

COMMISSIONER MILLER: I gather it means that as a technical matter, there probably is copyright.

COMMISSIONER HERSEY: In these repeated modifications?

COMMISSIONER MILLER: In the repeated output, that the end product, all being variations--Gabe used the word derivative--they're a form of transformation or derivation or modifications, they're really intellectually no different from the sequential drafts of an author's novel. And then you look at the array and you say that's the one I want to publish. It doesn't undercut the copyrightability of each of the sequential drafts.

COMMISSIONER HERSEY: But sequential versions are different works by definition under 102.

COMMISSIONER MILLER: Yes. This uses the word distinct works. Maybe that's not clear enough.

COMMISSIONER HERSEY: It isn't.

COMMISSIONER LACY: I had understood this sentence quite differently, and I wonder if Jeffrey really isn't talking about the copyrightability of the work and whether the author of the program used in the creation of the work might be considered an author or a co-author of the work if the program was either (a) devised solely for the creation of that

work or (b) modified for the creation of that work. Isn't that what you are talking about, whether the program author can be considered one of the authors of the work as well as the person who elected to employ the program?

MR. SQUIRES: If I can take a middle ground and say I think what was intended was an aspect of each. Yes, certainly the author of the program is attributed entitlement to copyright in the resulting work. And if there is a modification made in the program--in other words, if somebody initiates changes, gets a new idea and implements a modification, perhaps slight, perhaps not slight, into the program, that results in a different work with a slight or not slight difference; that small creative effort entitles him to copyright in the new material, the difference.

COMMISSIONER HERSEY: I should think this needs some explaining because the thing that concerns me is that modifications introduced in the process and on this maintenance program might well affect the product. And there the question would be whether the intention was the work of authorship or simply keeping the machinery up to date.

CHAIRMAN FULD: Dan.

COMMISSIONER LACY: Mr. Chairman, in thinking about this it seems to me that while I recognize the dangers of reasoning by analogy on it, that there has been developed in the Copyright Office and in copyright practice over many years

a body of experience and doctrine in connection with photography and the use of cameras in the creation of works that provided answers to a great many very comparable problems. I think everyone has conceded that a photographer who uses a photograph to reproduce a landscape or a portrait is entitled to copyright just as a painter might have done the same thing. And that's true even though the sophistication of the camera, with an automatic exposure meter, for example, an automatic focusing, may reduce the amount of artistic input it takes to create a photograph.

Two questions that have come up here have obviously also had to be dealt with in photographs. Several hundred tourists will take a photograph of the Capitol today, and several hundred did yesterday, and several hundred will tomorrow and so on ad infinitum. Those are all copyrightable and indeed since the 1st of January those are all willy-nilly copyrighted, every one of those hundreds and hundreds of photographs even though many of them will be substantially identical with each other because they were taken from the same position and the same sort of exposure. Obviously there has been no infringement of copyright because somebody else elected to use the same camera, the same program, the same data base--the Capitol, that is--to produce the same output as long as it was an independent decision, and he didn't take the other fellow's negative and copy the photograph.

Also I think we've had some experience in which the process of taking the photograph might seem to be made automatic. For example, in an observatory in which a telescope is aimed at the sky and a camera is attached to the telescope and it's set so that automatically every 15 minutes it takes a photograph of the sky--no human intervention beyond having set this apparatus up and decided that this will be done. I think none of us would feel a doubt, and I assume the Copyright Office wouldn't, that the resulting photographs are copyrightable and indeed are copyrighted, presumably under the ownership of the organization which owned the observatory and did it or similarly aerial photography and for mapping purposes in which you've got a camera set in a plane automatically set to trip every six seconds as you fly over a given area. It seems to me that the use of the computer is very analogous to all of these operations and that this might give us a useful body of examples and a useful body of precedent to apply to many of these same problems.

COMMISSIONER PERLE: On that level, counsel in the audience, Mr. Seton, one of the more distinguished copyright lawyers, says: "As to the example of proportions pursued in different sizes, this is a direct parallel to the transposition of musical compositions to different keys. Courts have held for decades that if a competent musical technician can

make the changes needed to make the transposition to a different key, then there is not original writing within the meaning of the copyright law of 1909 to constitute a new work," which is another complication.

COMMISSIONER LACY: That has nothing to do with a computer, presumably.

COMMISSIONER PERLE: The computer is merely the technician who is transposing it from C to F.

COMMISSIONER LACY: Yes, but I mean the introduction of the computer doesn't change the outcome of the case.

COMMISSIONER PERLE: Again we are not bound by prior law, however. Our charge here is, What should be the law? And I think that is what we should address ourselves to. And I think that we do have to put all this in a context which is meaningful and will be meaningful over a period of time. Are we talking about animation of a figure? Yes, I suppose we are, and we have to consider that.

Are we talking about the creation of a piece of music? I think we must be concerned with that because that may have both esthetic and pecuniary value; a piece of music created by means of or in part or in greater or lesser measure by a computer has an end product which has value. What we're really talking about here is protection. And it's not whether it's copyrightable or not. That's the means of protection. I think we have to ask what, under our concept

of the Constitution and the needs of society, what should be protected? And, second, if it should be protected, should it be protected by copyright? And I think that's what we have to address in this whole new works business.

CHAIRMAN FULD: Professor Nimmer.

VICE CHAIRMAN NIMMER: But we do have some limitation. It is true that we are not limited by existing law. We are limited by the Constitution unless our charge includes recommending amending the Constitution, as I suppose it might. But--

CHAIRMAN FULD: We won't go that far.

VICE CHAIRMAN NIMMER: --I don't think we intend that. And constitutionally of course, at the very least, there must be an author because Congress has the power only to grant copyright to authors; and there must be originality because by judicial interpretation of the constitutional clause, originality is not only a statutory requirement but also a constitutional requirement.

And, going to Dan's analogy of the telescope, it's an interesting one. If you had a camera going off every six seconds, 24 hours a day, so that there was no real choice of a moment in time because you're taking the sky as it is at every moment in time, and there is no choice of angle because you're taking the entire sky, and there's no choice of lighting maybe because the lighting is whatever it is

there--I don't know--maybe there isn't originality there.

COMMISSIONER LACY: But isn't doing the whole sky a choice?

VICE CHAIRMAN NIMMER: Pardon me?

COMMISSIONER LACY: Isn't doing the whole sky a choice? You could have chosen to do only the northeast quadrant. You could have chosen to do it every minute. You could have chosen a different lens apperture.

COMMISSIONER SARBIN: You could have chosen a different filter.

COMMISSIONER LACY: You could have chosen a continuous exposure instead of one every six seconds.

VICE CHAIRMAN NIMMER: The filter I think arguably is a point. On the angle--[laughter].

COMMISSIONER PERLE: P-h-i-l-t-r-e. [Laughter]

MR. SQUIRES: But having made that choice, if you set that camera into perpetual motion and it takes photographs forever, do you get a copyright on every photograph that comes out forever?

COMMISSIONER SARBIN: I only added filter by way of agreeing with what Dan was saying about the other elements.

VICE CHAIRMAN NIMMER: Then you get back to what we're talking about. It's like saying I want to take every word in the dictionary, and all the words in the dictionary are what I have in mind. Can you then claim originality on

all the words in the dictionary? I think what I'm saying, badly I think, is that there may be some limitations on originality, and it's not just our question of policy. It's a question of how far we want to go in regarding new works as protected.

COMMISSIONER LACY: That might be true of something that was done only by a human being, might it not, if a human being was sufficiently talented to make a drawing of the sky every 15 minutes in perpetuity or a series of human beings? You get all of these same issues of originality and so on. Our question is: Does the use of the computer as an instrument alter the body of copyright law, assuming that the person who made the decision to employ the computer and caused it to be employed, as one causes a camera to have its lens open and a picture taken is the proprietor of the picture taken.

Obviously there are limitations on copyright protection, but are they altered by the fact that the author employed a computer to do part of his work?

COMMISSIONER MILLER: What I'm hearing is a suggestion that when this portion of the report is written, it should make clear that the inconstancy of the law of originality--it's perfectly clear context makes a difference with regard to what kind of originality is needed for copyrightability. And the inconstancy of the law with regard to scope of protection is not really being discussed. That

has to be left for judicial development as the technology evolves and experience builds. But we are standing for a single proposition, that the intermediation of a machine in the creation of a new work doesn't necessarily deny that new work copyrightability. I think that's really all the subcommittee decided to say.

VICE CHAIRMAN NIMMER: But with emphasis, Arthur, on the word "necessarily." The line drawn in the committee report--which I approve of--I think suggests that on the other side of that line there may be some situations where there is not copyright protection by virtue of the intervention, by virtue of the fact the machine is involved rather than a human being.

COMMISSIONER MILLER: For extrinsic policy reasons, fear of monopoly, fear of blockage, fear of lack of originality, fear of scope of protection.

VICE CHAIRMAN NIMMER: All right, but once you said fear of lack of originality, then I think you go--it's really not important whether you call it policy or constitutional--

CHAIRMAN FULD: I think from all that has been said, in order to be helpful to the uninitiated, those who are not as expert as those on the subcommittee, it has to be made more clear in various aspects.

MR. LEVINE: I think we shall rewrite it and have

a draft--

COMMISSIONER LACY: I think it could be a lot shorter too.

MR. LEVINE: Yes. The question really is there is no, I think, argument with the basic principle as stated by Mel or by Arthur--I'm not sure--that it requires clarification.

CHAIRMAN FULD: And that will be done.

MR. LEVINE: Yes.

COMMISSIONER HERSEY: Mr. Chairman, since the issue of compatibility with the subcommittee report on computer programs has been raised, I would like to say that from the point of view of the dissenter to that report, I find no problem at all with the basic position of this report. In fact, I believe that in a couple of substantial ways it supports the dissent rather than the contrary.

CHAIRMAN FULD: Then it probably has to be changed. [Laughter]

COMMISSIONER HERSEY: I point out to you that the language it uses refers at one time to a program being an inseparable part of a machine. And the words it uses for the description of the function of the program, while including instructions, also for the most part are words like control, manipulate, extract, reproduce, and produce. And beyond that I think the argument can be made that the Supreme Court finding that a human nature must be involved in

the authorship, in the production, the usage over the years would also I think suggest a compelling logic that the reader, the user, also should have a human nature, and that seems to me to be in conflict with the report.

CHAIRMAN FULD: All right, we have the message. Thanks, Jeff.

This takes us to the Software Subcommittee report and the dissent. I have spoken to John before and I'd like to make clear--turning to page 8 of his dissent--Mr. Hersey writes: "Finally the report imputes to the dissent the desire to impose a standard literary artistic merit for determining copyright and suggests that this desire is prompted by elitist motives." John adds, "The dissenter mentions artistic quality or value as qualifications for copyright."

I don't think that our subcommittee intended to ascribe or attribute that thought to the dissent. On page 37 we did write, the first sentence: "The history of copyright legislation and the interpretations courts have made of the Copyright Clause all demonstrate that there is no basis"--and I would suggest adding to that or making it even more strong the insulation of the dissent. I suggest adding after the word "there is no basis, as some may urge, for the imposition of a standard of literary or artistic merit for determining copyrightability." I don't believe--

COMMISSIONER PERLE: What page is that?

CHAIRMAN FULD: Page 37. I don't believe that it was ever the design or the intention of the subcommittee to attribute to John the conclusion he says the report recites.

COMMISSIONER HERSEY: Mr. Chairman, I thank the Chairman for this exclusion. The minutes of CONTU will show that this has been imputed to me, and I'm very glad to be clear on it.

CHAIRMAN FULD: They didn't intend it.

COMMISSIONER PERLE: It was page 37 in the old draft. What is it in the new one?

CHAIRMAN FULD: Let me have it. I thought it was the same page.

MR. LEVINE: It must be forty--

CHAIRMAN FULD: It's 43. On the third line after the word "no basis" I would put, dash, "as some may urge." Page 43 instead of 37.

COMMISSIONER PERLE: Mr. Chairman.

CHAIRMAN FULD: Mr. Perle.

COMMISSIONER PERLE: Is it in order to comment upon this now? I find what I have to say quite difficult because I have a great deal of respect for Mr. John Hersey as a person. I was saddened and somewhat outraged to read the document of April 13, 1978. I respect the dissent. I respect John Hersey's viewpoint. I must say I do not understand it, nor do I understand the reasoning. But I respect him. And I

take great exception to the attack, the personal attack, that this document represents on Stanley Fuld, Arthur Miller, and Gabriel Perle. I think that this document must be read as impugning our integrity, our honesty, and our motivation. And lest there be any question, for the record, this subcommittee has come, as I read it, to an honest conclusion as to what protection should be accorded software, programming. It has done its level best and done, I think, herculean--a hell of a lot of work to respond to objections, exceptions, that have been raised.

In the process, it was never in my book "absurd." It was never "grossly misleading." It never made "numerous misleading equations." It was not "misleading." I do not believe that the language of the report is "unworthy of its authors."

Having said that, I have come reluctantly to the conclusion that there is nothing that I or anyone else on the subcommittee can say that will in any way, shape or form influence the conclusion that Commissioner Hersey has come to. And I will not argue with that. And I respect it. I would hope by the same conclusion, by the same thought process, that the conclusions that we have reached and that which we have expressed would be similarly respected.

I further suggest that it serves no useful purpose whatever to have any further discussion of the Software

Committee report nor of the dissent. I think everything that has been said and that can be said has been said.

CHAIRMAN FULD: I think John may want to say something, or do you not?

COMMISSIONER HERSEY: I think we are going to spin wheels if we talk in these terms. I received the last version of the Software Subcommittee report a few days before this meeting, and wrote a response in some haste. And if Gabe takes these things as a personal attack, I'm sorry for that. I certainly respect the Software Subcommittee.

There is one line concerning the--that I thought was unworthy of the authors--was in response to something which has now been corrected and on the record, and I stand satisfied with that. I do agree that we have discussed this as far as we can probably, and it should come to a vote.

CHAIRMAN FULD: Mel.

VICE CHAIRMAN NIMMER: Simply for the record and perhaps by way of explanation, I want to say briefly the position that as of the moment I intend to take. I intend to vote for the report, and I think it is a good report and really well done. But I intend to add what may be regarded as a brief concurring view, stating, first of all, that I do find sympathy and rapport with the underlying concerns expressed by John Hersey, and also that I do think that there may be a viable midway point along the lines I've previously

discussed--namely, limiting, not by virtue of constitutional necessity but by virtue of statutory desirability, limiting copyright protection for software to that software which is capable of producing what is a conventional copyrightable work rather than simply instructions to a machine. That midway position is addressed in the software report, and it is there suggested that this is not really an answer because it's always open to one who seeks copyright protection, to put the program in conventional form and thus circumvent the problem. I think the answer to that is that concern could be met by simply limiting the scope of protection for software programs to that act of reproducing it in conventional form but not giving an exclusive right to the use of the program for purposes of directing a machine.

Having said that, however, I intend that merely to be something borne in mind by Congress and other copyright watchers in the future as a possible route to take at some time in the future; but for the moment I am content with following the committee report and recommendations.

COMMISSIONER PERLE: Mel, could I make a request? Could you reduce that to writing and let us have it as soon as possible so we can consider it and think about it?

VICE CHAIRMAN NIMMER: I'll try, Gabe. My only hesitation is the "as soon as possible" problem.

CHAIRMAN FULD: You mean for inclusion into the

report of the subcommittee?

COMMISSIONER PERLE: I'd like to be able to think about specifically what Mel has to say.

VICE CHAIRMAN NIMMER: Yes. Are you suggesting the possibility of incorporating--I'm not saying--

COMMISSIONER PERLE: I don't know. Until I've seen what it is specifically--

VICE CHAIRMAN NIMMER: Yes, of course. Right.

COMMISSIONER PERLE: --I don't want to concur with it.

VICE CHAIRMAN NIMMER: Well, Gabe, I will try as soon as I can.

COMMISSIONER HERSEY: I thought you proposed, Gabe, that we should close discussion now and vote on the report.

COMMISSIONER PERLE: I did not intend to discuss this at this time. I merely asked to see Mel's in writing. And then I'll figure out what I want to do with it. It's a new thought.

CHAIRMAN FULD: Before we have a show of hands, may I read the memorandum that Bob Wedgeworth left: "I regret that my responsibility as a member of the Board of Visitors at Princeton University Library will prevent my participation in the April 21 meeting of CONTU at which the Software Committee's final report will be discussed. However, I would like to go on record as responding to two points. First, I

would like to be recorded as voting in favor of accepting the April 12th draft, number three, of the Software Subcommittee report. Second, I share Commissioner Hersey's concern that this version of the Software Subcommittee report, as well as previous versions, do not address directly the implications posed by the acceptance of computer programs as a proper subject matter for the copyright law, although I do not share Commissioner Hersey's conclusions on this issue."

The final paragraph: "I believe it important that the final report of CONTU reflect the debate on this issue which has gone on within the Commission, led by Commissioner Hersey and supported to some extent by the late Dr. Dix. This question is a significant public issue, not only to many persons who testified before the Commission but to many others who are likely to read and be influenced by the CONTU recommendations. Therefore, I believe that the consensus of the full committee with respect to the social implications of computer programs as acceptable copyright subject matter, should be addressed directly in the CONTU's final report."

And with that I suggest we have a show of hands of those, first, in favor of the report.

MR. LEVINE: May I, Judge, just before that, report that we were in touch with Mrs. Karpatkin; and if she were here and voting, she would vote against the Software Subcommittee report. She will submit a separate writing

shortly.

CHAIRMAN FULD: With those two statements, may I have a show of hands, first, of those in favor of the Software Committee report? [Show of hands]

Six in favor. And with Bob Wedgeworth, seven.

COMMISSIONER PERLE: And yourself.

CHAIRMAN FULD: And myself is eight.

Those opposed, a show of hands. [Show of hands by Commissioners Hersey and Wilcox.]

Two, and we'll note Dr. Dix's concurrence with the dissent, and Mrs. Karpatkin's.

COMMISSIONER LACY: Dr. Dix's statement was that as of that moment, his propensity was to say so. I don't think we have any record that he would vote--

COMMISSIONER HERSEY: I'd like to have his words taken from the minutes in this context. It would put them in a time frame.

CHAIRMAN FULD: So, there are three opposed, with Dr. Dix' expression of his intention as part of the vote.

COMMISSIONER PERLE: Wouldn't it be great if we could know what he is saying now.

MR. LEVINE: I might just suggest that--I don't know. I haven't had a chance to talk to Mrs. Karpatkin directly. But at least in part one of her concerns at the last meeting was that the subcommittee draft did not take

into consideration the monopolization impact of protection for computer software. And one of the things we might do-- I think we are suggesting a five-year review of all of our recommendations by the Register, that that be included in the five-year review. Perhaps this would satisfy Mrs. Karpatkin.

CHAIRMAN FULD: I don't understand what you mean--

COMMISSIONER SARBIN: I'd like to raise a point of order, if I may.

CHAIRMAN FULD: I don't understand what you mean-- that she might change her vote?

MR. LEVINE: No, I just don't know. It might ease her concerns. I don't know specifically at this point what her concerns are.

CHAIRMAN FULD: She had the report before, didn't she?

MR. LEVINE: She had the report before, yes. She read the report.

COMMISSIONER WILCOX: I think if there could have been some discussion of Bob's suggestion, I might have voted differently too. But there was no recognition that any of that would be followed in the full report. But if there would be some assurance that the full report might take some cognizance of that, that would make a difference. But the question only was raised on the report as it is.

COMMISSIONER LACY: The full report itself will be

submitted for a vote.

CHAIRMAN FULD: And this will be part of the record.

COMMISSIONER SARBIN: I just really would like to raise a question that refers to that book in front of you. What process is there for this Commission taking a vote which includes the vote of absentee or absent members? I mean, is there a proxy vote? Is there some legal process?

MR. LEVINE: It is not strictly within Robert's Rules of Order that proxy votes can be counted.

COMMISSIONER SARBIN: Then what the hell are we doing?

CHAIRMAN FULD: What is the objection to it? Why shouldn't we reflect it even though it may not be strict parliamentary rule?

COMMISSIONER SARBIN: It just seems to me that as a governmental body, we should follow rules that are certainly not different from lesser organizations with respect to the carrying on of votes. I have no problem with recording letters. I have no problem with recording statements.

CHAIRMAN FULD: Realistically, Hersh, we know what the views are. They have been expressed at length by the various parties.

COMMISSIONER SARBIN: I think without a process and some real procedure for recording those votes--

CHAIRMAN FULD: I think fairness would suggest that they be considered.

COMMISSIONER MILLER: I first share Hershel's thought, that the notion of proxy votes is, to me, somewhat offensive. We don't do it with juries or corporate directorships or other forms of decision-making bodies. In particular, with all due respect and great personal affection and regret at Bill's passing away, the notion of recording the vote of someone who did pass away and did not complete the deliberative process, let alone wasn't here at the time of the vote and let alone did not see the report which we are now voting on--the last report Bill saw was an early draft, and I think the common consensus is that this draft is a substantial revision of that draft. I find great difficulty with that.

Having said all that, I think I would at least argue that it is important to keep in perspective what it is we are voting on today. I take it we are voting merely on the the acceptance of this report. Autobiographically at the last meeting--I think Alice most clearly remembers--I instigated the withdrawal of the report because I had personally come to the conclusion by way of 12th hour revelation that I wasn't satisfied with the way that draft was written, and I wanted it rewritten. It is now rewritten. I am infinitely happier with it. But I still have inside me

the notion that the final product of this Commission will be even better and will explicate areas not simply here but in the context of other subcommittee reports to make our report something we all can be proud of, and that the community will pay attention to.

Therefore, I at least am assuming that this vote today is on this document for passage to the drafting committee to be referred back to us as part of the full Commission report where it may well be that you will find the ability to adhere and Rhoda may and other people may switch around. So, in that context--although I recognize the procedural point, I'm not prepared to push it, whereas in another context I would.

COMMISSIONER SARBIN: I want really to raise it today so that when we come to the point where we will be considering votes that are final votes, we have a process which does conform with Robert's Rules of Order.

COMMISSIONER HERSEY: I'd like to say that my interest here is not in the counting of votes. It is that this difference of opinion, which I believe is an honest difference of opinion, be taken seriously in further debates on this issue. And so I think that we've been talking for several months about coming to a conclusion on this report, and I for my part find now some difficulty with the notion that this vote is not a vote, and we'll settle

the matter later. That seemed to me not important.

It seems to me what is important is what Bob Wedgeworth said in his letter, that this difference of opinion be represented clearly and that it be dealt with later on in a serious way.

COMMISSIONER LACY: Mr. Chairman, I'm assuming--or am I correct in assuming--that there will be an opportunity for any member of the Commission to record any dissenting views he may have to the final report and that those would be published as a part of the report or in the same publication.

CHAIRMAN FULD: I would assume so.

COMMISSIONER LACY: That would be a normal practice.

COMMISSIONER HERSEY: Yes. Mel has already declared his intention of doing just that.

COMMISSIONER LACY: I would certainly be very unhappy if that were not done. I think the fullest expression of any dissent is important. Our report is only going to be a recommendation to Congress. If the dissenting views appeal to Congress--

COMMISSIONER PERLE: I think that it's terribly important that we develop--and perhaps now is the time to do it--some sort of--

CHAIRMAN FULD: Schedule.

COMMISSIONER PERLE: --format, ground rules, for what the report the report would be. In my concept of the thing, I always sort of assumed that we would have a short, concise statement of what the recommendations of the Commission were, even as a statute ends up being enacted even though there are yeas and nays. And then in the document affixed to the recommendations, much in the same way that there is a Senate and House report, there would be a full exposition of the process by which we have come to the conclusion, the dissenting views, and the concurring views. But I think it's terribly important that we figure out what we are going to present to the Congress, to the President, and indeed to the public and how we're going to do it because we have to have a mechanism.

CHAIRMAN FULD: I would think what you've said reflects the thought that I had.

COMMISSIONER PERLE: How does the rest of the Commission feel?

CHAIRMAN FULD: We voted on this. This is the present view of the--

COMMISSIONER PERLE: I'm not just talking about software, Judge.

CHAIRMAN FULD: Well, of each of the reports. We haven't voted on the other reports--we have not on the Photocopy, we have not on the New Works Committee.

COMMISSIONER MILLER: I would assume, however, that the time frame being what it is, that the staff can start on those portions that are passed through--

CHAIRMAN FULD: That was my understanding. And that was the Director's thinking too.

Do you want to say anything?

COMMISSIONER SARBIN: No, no, it's all right.

CHAIRMAN FULD: Is there anything else more to be taken up? John.

COMMISSIONER HERSEY: I have some difficulty with the notion that we now start all over again.

CHAIRMAN FULD: No, we're not starting.

COMMISSIONER HERSEY: We've spent several meetings trying to arrive at agreement, on the one hand, and a clear difference of opinion on another. When are we to--

CHAIRMAN FULD: The final report, as I understand it, will be a conclusion, conclusory in form, as to what our thinking was on each of the subjects, and perhaps appended to it the reports of the subcommittees.

COMMISSIONER MILLER: My perception of where we are right now is that on those portions of our work that we have approved, the relevant documents are returned to staff to begin the formulation of a master outline of the report and to begin the final writing of those portions of the report that are now, quote,"ready," in keeping with the contents of

those documents as approved by this Commission, and that what is left open in that sense is the fuller exposition of those areas this Commission at this meeting has identified as ambiguous or has identified as requiring fuller explication, and that that document will then come back to the full Commission. I do not view the situation as being one in which we start over again or one in which any significant philosophical or substantive issue is open but one in which the normal editing and clarification and development process is initially in the hands of the staff and secondarily in the hands of the drafting subcommittee and tertiarily--if there be such a word--is in the hands of the full Commission. That's one person's conception of where we are.

CHAIRMAN FULD: That's what I thought I said. The draft report of the subcommittee has been approved. The Data Base Subcommittee report has been approved. They'll be reflected in the final report. We await the Minneapolis or earlier getting together of the Subcommittee on Photocopying, and the receipt of a Photocopy Subcommittee report revised. The same with the New Works Subcommittee report. Those two documents will be circulated to the various Commissioners. We'll have a chance to consider them and vote on them at our next meeting. And the substance of them will be included in the final report of CONTU.

COMMISSIONER CARY: Mr. Chairman, may I also

suggest that Mel's indicated concurring view be distributed to each Commissioner?

CHAIRMAN FULD: I think he planned to do that.

Is there anything more as to future meetings?

COMMISSIONER MILLER: If I could return to what Hershel said, the meetings we have left to us come at a very difficult time of the year, early summer, and we do have the problem of a Commissioner who has engaged in all the collegial debate thus far and studied the draft of the final report not being available on that one day in July.

CHAIRMAN FULD: I leave for Europe on July 10th.

COMMISSIONER PERLE: The meeting is going to be July 11th.

COMMISSIONER MILLER: It should be, I think, a Commission decision.

COMMISSIONER SARBIN: I'd like to make a suggestion about this. The very first meeting of the Commission we adopted Robert's Rules of Order as the basis for our procedure. Now, those rules proscribe absentee voting--that is, unless we adopt bylaws to the contrary. I think it would be appropriate for us to adopt such a bylaw if indeed we want to allow absentee voting. I'm very much for it. But I am only for it within the scope of the rules we have agreed to live by. So, I mean, I think if the staff would simply circulate for a vote or if anybody wants to say okay, we will

draft a bylaw which we will agree upon at the very next meeting that allows this, then I am very happy to do that. That is the first time I have behaved as a lawyer in all these...

MR. LEVINE: We will so circulate a bylaw. I was very conscious of Robert's, having it in front of me, and would have raised the question of our procedure had it been determinative, had the absentee votes been determinative of the final result. As it is, I can't conceive of a situation in which we submit a final report to Congress in which we say that eight members are in favor of this report, two are opposed and two are on vacation.

COMMISSIONER HERSEY: Are we operating under bylaws? Do we have a set of bylaws?

MR. LEVINE: No, we're operating under Robert's Rules of Order.

COMMISSIONER SARBIN: But we are free to adopt a rule.

COMMISSIONER HERSEY: Wouldn't the sensible thing be to move this exception now? I certainly would move--common sense. We've all been studying this thing for a long time. I think we've all made up our minds one way or another. And say we'll operate that way.

CHAIRMAN FULD: That's a good suggestion.

COMMISSIONER PERLE: Except under Robert's Rules of

Order I think it has to be done on notice. The parliamentarian will so state.

CHAIRMAN FULD: You're acting as lawyers, and I'm acting as a Commissioner.

COMMISSIONER PERLE: Well, no, I am acting as a Commissioner.

COMMISSIONER HERSEY: Let's be sensible, whatever the need.

COMMISSIONER SARBIN: The staff can handle it.

MR. LEVINE: We'll have something prepared in one form or another for the next meeting, which hopefully reflects common sense.

COMMISSIONER PERLE: Who has a vote, the Librarian of Congress or--

MR. LEVINE: The Librarian of Congress has a vote. It is a personal vote. It can't be delegated.

COMMISSIONER PERLE: Has there been any indication from the Librarian, any response from the Librarian, on any of these documents, specifically the Software report?

CHAIRMAN FULD: Is he familiar with the program, Ed?

MR. APPLEBAUM: He has given no indication to me about these documents.

COMMISSIONER PERLE: I think that it is essential that the Librarian be requested to either vote yea, nay, or

no vote. But I think that when the final vote comes, I think we should have every Commissioner entitled to vote as recorded.

COMMISSIONER HERSEY: Could the record show the number of meetings he has attended?

VICE CHAIRMAN NIMMER: I think that is a well-taken point. I must say I personally feel regret and am disappointed by his failure to attend, even though he has sent a very able representative under the statute.

COMMISSIONER HERSEY: I agree with that too.

VICE CHAIRMAN NIMMER: Under the statute he is made a member, and Congress expected him to attend, in my understanding.

MR. LEVINE: I perhaps should state for the record that I did attempt to get him to this meeting, but he has been out of the city and he is out of the city these two days.

We now have meetings scheduled for May 18th and 19th and June 22-23. We may want to have a one-day meeting in July. I don't think it will require more than one day.

CHAIRMAN FULD: I'd like to make it before the 10th.

COMMISSIONER HERSEY: What are the June dates again?

MR. LEVINE: The June dates are 22 and 23.

COMMISSIONER MILLER: In Minneapolis.

MR. LEVINE: No. May 18 and 19 in Minneapolis; and

June 22 and 23 probably New York City.

VICE CHAIRMAN NIMMER: And we have a July meeting too?

COMMISSIONER PERLE: We'll have to.

VICE CHAIRMAN NIMMER: I just think it's important that our last meeting be here. And if the June meeting is our last meeting, then the June meeting should be here, in my opinion.

MR. LEVINE: Can we set aside July 7? Or July 6th?

CHAIRMAN FULD: I'd like July 6th.

COMMISSIONER HERSEY: That leaves only two weeks between the June and July meetings.

MR. LEVINE: Yes, I recognize that.

COMMISSIONER PERLE: But that's when the final vote will be taken.

COMMISSIONER LACY: We're assuming the July 6th meeting will be really ceremonial and social, and too late to do any work.

MR. LEVINE: I would hope that that's all that's left to be done for July 6th.

CHAIRMAN FULD: And what is the mechanics of submitting the report to Congress and the President?

MR. LEVINE: I will explore that. Probably some formal presentation will be made.

CHAIRMAN FULD: Would July 10th be more suitable than

July 6th?

COMMISSIONER SARBIN: I was just going to ask is it possible to push it back more toward July 10th?

MR. LEVINE: July 10th is probably better for us if we have additional preparations.

COMMISSIONER SARBIN: Arthur, will you be back?

COMMISSIONER MILLER: I'm in this position. I'm in San Diego on the 6th and Los Angeles on the 10th. But, if we met in the morning of the 10th, I could fly back on the 9th and return to Los Angeles in the afternoon to my appointed rounds.

COMMISSIONER PERLE: And will you have jet lag.

COMMISSIONER MILLER: Assuming of course the Commission would understand my temporary duty station for purposes of reimbursement of expenses was Los Angeles.

COMMISSIONER SARBIN: July 9th is what you're talking about?

COMMISSIONER MILLER: The 10th.

CHAIRMAN FULD: July 10th.

COMMISSIONER SARBIN: July 10th, I'm sorry.

CHAIRMAN FULD: That's a Monday.

COMMISSIONER WILCOX: But can you make that?

CHAIRMAN FULD: Yes. I was wrong; it's the 11th.

COMMISSIONER SARBIN: I think that would be very good.

CHAIRMAN FULD: We will have it here. It will be in Washington.

As I understand it, the Subcommittee on Photocopying was going to meet prior to--

VICE CHAIRMAN NIMMER: We're going to meet the morning of the May 18th meeting and hope we will be able to present our report to the entire Commission after the May 18th meeting.

CHAIRMAN FULD: And hopefully also the New Works Subcommittee report will be circulated prior to the Minneapolis meeting to be considered at the Minneapolis meeting.

MR. LEVINE: Can we go off the record briefly?

[Discussion off the record.]

CHAIRMAN FULD: Is there anything else to be considered before we adjourn till the next meeting?

No one having anything to say, we'll call it a day and adjourn to our May meeting.

[The meeting was adjourned at 11:05 a.m.]

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National Commission
on Libraries and Information Science

162a

NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE COMMENTS ON THE DRAFT REPORT OF THE CONTU SUBCOMMITTEE ON PHOTOCOPYING

Douglas S. Price, Deputy Director

April 20, 1978

1717 K STREET, N.W. SUITE 601 · WASHINGTON, D.C. 20036

The National Commission on Libraries and Information Science welcomes the opportunity to offer its comments on the draft report of the Subcommittee on Photocopying. Our comments are few, and only two of them will require extensive discussion, so I will address the brief ones first.

In Table II on page 17 and the discussion on pages 16 and 18, the use of the 1.93 million figure in column 3 implies that all of the copies over five years old may require authorization. This would be a more stringent set of rules for the older material than for the more recent material, and we feel sure that it is not the intent of Congress that "aggregate quantities" be interpreted more stringently for older material.

On the other hand, we would like to point out that in the discussion of "intrasystem" usage, the paragraph beginning on the bottom of page 22,--as it is presently written--has a potential for encouraging abuse of photocopying. I have no doubt that following witnesses will speak to this point in some detail. Note that we do not disagree with the interpretation of "intrasystem" as presented, but taken out of context--and it will be--the statement could be misleading.

Two other quick points before I get to the more substantive issues. On page 94, you suggest that NCLIS and the Register might bring together a group to develop standard language for granting copying permission beyond that allowed by the 1976 Act. NCLIS will be glad to cooperate in such a venture, if there is sufficient interest in the community and sufficient application to justify the expense. With regard to the suggestion on page 96 that the Library of Congress, the Copyright

Office, and NCLIS explore with interested parties the inclusion of copyright data in the CONSER record, we are willing to participate, but would caution all that such inclusion would be a very expensive process and suggest that a careful cost/benefit analysis would be the first step.

On the more substantive issues, I would first like to address the table on page 65 and the observations on page 66 with respect to the King report. We feel quite strongly that there is no justification for ascribing the apparent discrepancy in the public library figures to--and I quote--"something basically erroneous in the estimates prepared from the samples in the King study. . ." At our request, King Research did an analysis of the public libraries in their sample, and the results of this analysis, along with their transmittal letter, are attached to this statement. You will note that none of the libraries approaches a 30% payments-to-periodicals-budget ratio, and only six of them exceed ten percent.

As is stated in the [illegible] report, the 30% ratio "does not seem in accord with common sense." If you examine the source of the periodicals budget figure used in arriving at that figure, you will find that there are some other items which seem to violate common sense. According to Table 17 of the LIBGIS I report, the periodicals budgets of all of the public libraries in the United States are less than 9% of the total budget for books and periodicals; and is precisely equal to the sum of expenditures for microforms and audiovisual materials. I doubt if you will find any librarian, public or otherwise, who would accept those as common sense figures.

I discussed these figures with the National Center for Education Statistics, and was told that, in fact, Table 17 was constructed manually, after the contractor had completed his work, by applying the percentages in Table 18 to the total dollar expenditures shown in column 3 of Table 20. (Copies of these tables are also attached to this statement.) You will note that the percentages are shown only to one decimal point, and this accounts for substantial errors in Figure 17, including the failure of the individual entries to add up to the total. Aside from this error, which is relatively minor, NCES agrees that the figure for the total periodicals budget is too low, but they are not willing to speculate on how low. Fortunately, there appears to be a way to resolve the question fairly quickly. For our National Inventory of Library Needs - 1975, we obtained for our contractor, Boyd Ladd, the IBGIS I magnetic tape file. We have discussed the possibility of using this tape to produce a national total periodicals budget figure for public libraries with CONTU staff and we have asked Ladd and King to prepare a cost estimate for this work. The results of this analysis should provide a definitive answer to this question.

Finally, I would like to offer some clarification of your discussion of the National Periodicals System, call your attention to what we feel is an inconsistency in approach, and register a protest. The clarification we wish to offer is on the role of the National Periodicals Center as a part of a total system. The discussion in the subcommittee report, after listing the three levels of the system and giving passing mention to the roles of Levels 1 and 3, discusses the Center as if it were an independent entity. It is not intended to

be anything other than a part of a total system, a "black box" if you will, which is inserted into the system to improve its efficiency. It is not, by any stretch of the imagination, intended to be an American version of the British Library Lending Division. I should like to try to put into perspective how the total system is expected to operate. In the first place, our task force report, having been prepared essentially by librarians for librarians, fails to emphasize one very significant aspect. While it speaks of Level 2 as backup to Level 1 and Level 3 as backup to Level 2, it fails to point out that the whole concept of interlibrary loan is backup to the individual library, which is expected to have a collection which will satisfy most of its users needs right on the spot, or at least within the local system. The King Report shows that this is, in fact, the case, with some 88% of the photocopies of periodical articles being made for local users. The whole system we are discussing then is dealing with only 12% of the total volume, and of that, 80% will be filled by existing state and regional centers and five to eight percent by existing national libraries and research collections. This will leave approximately 12% to 15% of interlibrary loans which will be filled by the Center. At the volumes estimated in the King Report, that is fewer than 1,000,000 copies out of 48,000,000. The system, when it is in full operation, will improve the effeceiveness of the Interlibrary Loan system by providing hierarchical channels for requests. No longer will the large research libraries be overburdened with requests simply because they are large and well-known. Each library will have a state or regional center to which it will direct its requests. That center, in turn, when it cannot fill the request, will

forward it to the National Center, which again in turn, will fill or forward, not at random, but in a precisely focussed fashion to an institution which is known to possess the particular material. The Center could not function without the heirarchical system, nor the system without the Center.

The point, of course, is that the National Periodicals Center is not a stand alone entity, but an integral part of a system, most of which is already in place.

The inconsistency we want to point out lies in the fact that Section VIII.C recommends a change to the law to give commercial copiers some claim to fair use on the part of their clients, while Section III.D denies both fair use and Section 108 benefits to the proposed nonprofit National Periodicals Center. We must ask why you propose to deny the user of the public or academic library privileges which you wish to give customers of the commercial copier.

Therein lies the root of our protest. While the report acknowledges the vast uncertainties surrounding the establishment of the Center, its design, its start-up schedule, its modus operandi, etc., the report states on page 42 that it "would be required to secure authorization. . .," and on page 45 that it "is probably not entitled to the benefits of Section 108 . . ." The Commission disagrees strongly with both of those statements, but it is not my purpose this morning to obtain a reversal. The question will not--can not--be settled here and now. All we are asking is that the question be left open until the facts are in and at least some of the uncertainties are eliminated. As it is now written, Section III.C will have the effect of closing off debate. No matter how they are qualified or hedged, the two statements

cited will rise again and again to block attempts to achieve a reasonable accommodation. We ask that they be deleted and that the related discussion be restructured in the subjunctive. A discussion preceded by "if it were required to secure authorization. . ." or "if it were not entitled to the benefits of Section 108. . ." would be much less likely to become a serious impediment to future development and discussion.

King Research, Inc.
6000 Executive Boulevard, Rockville, Maryland 20852 (301) 881-6766

MEMORANDUM

TO: Douglas S. Price DATE: April 12, 1978

FROM: D. W. King

SUBJECT: Response to CONTU's Draft Report of the Subcommittee on Photocopying, dated March 15, 1978

In the section "Estimates of Total Additional Costs for Libraries", it is noted that an apparent anomaly has occurred in which our estimates for amount of photocopying in public libraries seem to be out of line with previous estimates of the total expenditures in public libraries for periodicals. The purpose of the comparison in the report is to show the relationship of estimated total annual additional costs to libraries for copying fees for periodicals as compared to total library expenditures for periodicals. It was shown in the CONTU draft that likely additional costs in academic libraries (derived from our data) are only 0.3 percent of total expenditures for periodicals and, by making assumptions about total expenditures from other data sources, an equivalent ratio would be 6.3 percent for special libraries. However, by applying the same rules to our public library data compared to NCES' estimates for total expenditures for periodicals in 1974, one arrives at a figure of 33 percent which seems too high. The authors conclude that "there is something basically erroneous in the estimates prepared from samples in the King study on the amount of copying by public libraries". They go on, in this draft report issued for public comment, to solicit analytical comments on this point. This memorandum is in response to that point.

Obviously, there could be some mistake in our data or in NCES's. The NCES estimate ($13,362,538 total public library periodicals expenditures in 1974) appears to be too low because it implies that the average total annual periodical expenditure per library for the 8,310 public libraries in 1976 is about $1,600. This assumes that the $13 million figure did not change much between 1974 and 1976. In our survey of libraries, for the 63 public libraries that reported "current year's actual or projected acquisition budget for serials (exclude binding and round to nearest dollar)", only three reported under $2,000 serials acquisition budget. Our 25 certainty libraries account for a total of over $5,000,000 annual serials budget alone. Thus, the remaining 8,285 libraries would have an average budget of under $1,000. However, we recognize that there are many small public libraries located throughout the country. This would tend to bring down the average expenditure figure for all public libraries. However, it does not appear likely that this reduction could be that extreme.

In any survey there are many sources of error. Inadvertant mistakes can occur. In the photocopy survey, we went to great lengths to avoid such mistakes. The survey was very carefully conducted and we feel that libraries were exceptionally diligent in responding to data requests. The response rate to the volume log questionnaire (which asked for photocopying volume by type of material copied

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by public librarians) was 83 percent. This is very high compared to most other library surveys. Because of the question raised in the Draft Report, we went back to the raw data forms and rechecked every response to verify our reported results. We could find no errors in our reported data. Obviously, the problem could be due to statistical variance and we reported the standard error of the public library estimates as being ±0.15 of the estimates. However, the standard error is a conservative estimate and it is very unlikely that the estimates could be off by a factor of two or more.

We feel that it will be helpful to CONTU's subcommittee to present data that will directly compare additional costs (due to copying fees) to total expenditures. We also feel that by displaying individual library data for photocopying and annual serials budget, one can gain some additional confidence in the photocopying survey data. Thus, we have done some additional analysis for individual libraries.

As mentioned previously, 63 public libraries reported annual serials acquisition budgets. We computed the cost for copying fees for these libraries using the same procedures applied in the Draft Report. Data for (1) the computed costs (without a five year cut-off), (2) annual serials acquisition budget and (3) ratio are all given by library in Table 1 by six ranges in the size of reported serials acquisition budget. It is cautioned that these are individual libraries and that each has a different weight when estimating total costs or budgets.

As one can see, the proportion of payments to budget increases as the reported budget decreases. With public libraries reporting a serials acquisition budget over $100,000 the average proportion is 1.3 percent and this amount grows to 8.5 percent for public libraries reporting budgets under $3,000. The highest proportion is 18.2 percent and only six libraries have over ten percent. Even if our estimates of total photocopying are high, the overall proportion of budget devoted to copying fees is likely to be about 3 or 4 percent. It is highly unlikely that this proportion could be as high as 10 percent because the certainty libraries dominate the numerator and denominator of the proportion.

Table 1 Proportion of Royalty Payments to Reported Periodicals Acquisition Budget with Public Libraries Reporting Over $100,000 Periodicals Acquisition Budget: 1976

Reported Periodicals Budget	Library No.	Total No. of Photocopy Items	Total Eligible for Royalty Payments	Total Periodicals Budget ($000)	Total Royalty Payments ($000)	Proportion of Payments to Budget (%)
>$100,000	004	7,900	2,920	217	3.6	1.7
	005	2,450	720	525	0.9	0.2
	008	400	150	145	0.2	0.1
	012	3,850	1,370	221	1.7	0.8
	013	5,560	1,670	114	2.0	1.8
	019	39,770	14,930	556	18.6	3.3
	021	1,210	210	109	0.3	0.3
	023	2,010	730	159	0.9	0.6
	024	0	0	150	0.0	0.0
	025	5,350	1,480	147	1.8	1.2
Average		6,850	2,418	234	3.0	1.3
$50-99,000	020	100	30	54	.04	0.1
	040	1,590	530	99	0.6	0.6
	043	6,700	2,940	85	3.7	4.3
	053	240	90	73	0.1	0.1
	058	5,200	1,850	81	2.3	2.8
	068	24,470	4,700	70	5.9	8.4
	069	330	70	50	0.1	0.2
	076	500	120	70	0.1	0.1
	088	960	300	60	0.4	0.6
	108	0	0	80	0.0	0.0
	121	260	90	93	0.1	0.1
	122	3,150	1,490	62	1.9	3.0
	147	40,050	7,270	65	9.0	13.8
Average		6,427	1,503	72	1.8	2.5

Table 1 Proportion of Royalty Payments to Reported Periodicals Acquisition Budget with Public Libraries Reporting Over $100,000 Periodicals Acquisition Budget: 1976 (Cont'd)

Reported Periodicals Budget	Library No.	Total No. of Photocopy Items	Total Eligible for Royalty Payments	Total Periodicals Budget ($000)	Total Royalty Payments ($000)	Proportion of Payments to Budget (%)
$25-49,000	037	1,110	520	28	0.7	2.5
	041	900	220	26	0.3	1.2
	044	732	260	38	0.3	0.8
	049	2,560	890	33	1.1	3.3
	051	2,040	540	33	0.7	2.1
	070	17,850	6,560	45	8.2	18.2
	091	6,000	2,090	32	2.6	8.1
	095	1,300	380	35	0.5	1.4
	115	2,280	390	26	0.5	1.9
	143	370	150	29	0.2	0.7
Average		3,514	1,200	33	1.5	4.5
$10-24,000	026	0	0	12	0.0	0.0
	047	0	0	10	0.0	0.0
	060	1,390	240	11	0.3	2.7
	067	160	70	14	0.0	0.5
	077	6,980	2,440	22	3.0	13.6
	078	890	320	23	0.4	1.7
	084	270	100	18	0.1	0.6
	089	2,280	920	14	1.1	7.8
	102	29,120	20,480	24	2.6	10.8
	117	11,550	2,000	17	2.5	15.0
	123	3,490	1,120	10	1.4	14.0
	129	1,520	300	20	0.5	2.5
	130	110	40	20	0.05	0.3
Average		4,443	2,161	17	0.9	5.3

Table 1 Proportion of Royalty Payments to Reported Periodicals Acquisition Budget with Public Libraries Reporting Over $100,000 Periodicals Acquisition Budget: 1976 (Cont'd)

Reported Periodicals Budget	Library No.	Total No. of Photocopy Items	Total Eligible for Royalty Payments	Total Periodicals Budget ($000)	Total Royalty Payments ($000)	Proportion of Payments to Budget (%)
$3-9,000	028	1,430	640	4	0.8	0.2
	033	0	0	5	0.0	0.0
	072	0	0	6	0.0	0.0
	098	60	10	5	0.01	0.2
	119	270	130	4	0.2	5.0
	135	340	120	4	0.1	2.5
	140	960	340	4	0.4	10.0
	148	270	100	3	0.1	0.3
Average		416	168	4	0.2	5.0
< $3000	032	900	150	2	0.2	10.0
	046	500	180	2	0.2	10.0
	073	90	20	3	0.02	0.6
	074	270	100	2	0.1	5.0
	080	60	20	1	0.02	0.6
	085	0	0	1	0.0	0.0
	126	2,010	720	3	1.9	30.0
	133	130	50	1	0.06	6.0
	144	0	0	2	0.0	0.0
Average		440	138	2	0.17	8.5

Table 37.—Operating expenditures, by major category and capital expenditures for public libraries, by metropolitan status and population of area served: United States, fiscal year ending in 19[illegible]

Metropolitan status and population of area served (1)	Total expenditures (2)	Salaries and wages (3)	Supplies and materials: Books (4)	Supplies and materials: Periodicals (5)	Supplies and materials: Microforms (6)	Supplies and materials: Audiovisual (7)	Supplies and materials: Other (8)
All public libraries	$1,113,545,633	$587,992,677	$130,079,999	$13,369,930	$2,837,090	$11,139,140	$17,816,717
500,000 and over	353,959,512	179,817,053	38,946,300	4,009,080	777,931	3,639,034	3,637,034
250,000 - 499,999	115,312,997	63,783,517	13,034,024	2,603,176	343,336	1,946,116	1,460,664
100,000 - 249,999	119,097,427	66,294,396	18,933,903	2,049,169	462,290	1,695,072	3,081,948
50,000 - 99,999	149,436,713	81,144,135	18,330,132	1,793,241	448,310	1,242,677	2,839,290
25,000 - 49,999	130,390,363	68,063,073	19,167,413	1,825,440	391,178	1,303,906	2,860,390
10,000 - 24,999	124,717,696	56,234,446	16,093,434	1,759,330	362,133	845,026	2,112,919
Under 10,000	80,484,379	38,916,916	18,061,900	1,706,366 [illegible]	80,424	321,690	1,930,186
Within SMSA Central	612,687,075	336,577,082	60,020,933	7,352,045	1,275,374	6,730,390	7,390,845
500,000 and over	343,070,317	180,469,467	36,432,183	3,780,604	607,737	3,430,709	3,094,907
250,000 - 499,999	86,618,095	48,619,581	10,337,011	1,300,283	260,437	1,415,021	1,128,646
100,000 - 249,999	79,712,600	33,340,342	11,646,305	1,192,352	179,429	997,187	1,794,820
50,000 - 99,999	49,683,091	26,979,319	6,759,690	643,906	198,740	396,871	1,162,737
25,000 - 49,999	20,824,343	11,007,404	2,021,707	317,363	69,433	203,243	333,190
10,000 - 24,999	10,506,959	4,938,771	1,323,077	90,363	31,321	32,335	135,390
Under 10,000	1,360,540	660,943	267,243	16,300	*	10,083	39,247
Within SMSA Other	300,099,306	163,239,777	40,931,496	4,019,178	617,719	3,397,433	6,406,087
500,000 and over	40,066,094	22,940,082	8,971,180	941,043	40,174	800,360	843,690
250,000 - 499,999	47,601,750	19,176,119	3,766,343	304,631	33,307	490,407	332,346
100,000 - 249,999	37,130,189	21,932,300	4,911,939	491,194	113,372	413,410	946,604
50,000 - 99,999	62,396,277	36,690,683	7,420,372	773,133	139,193	839,732	904,348
25,000 - 49,999	63,475,617	34,737,238	9,167,349	807,939	190,077	634,256	1,327,815
10,000 - 24,999	48,344,369	33,293,706	9,431,328	800,477	203,033	346,733	1,790,343
Under 10,000	46,976,306	22,190,363	4,937,096	403,976	86,920	136,647	700,130
Other than SMSA	[illegible]	86,019,909	25,495,774	2,007,977	303,997	1,339,907	3,099,907
100,000 - 249,999	16,663,309	8,947,717	2,373,080	109,646	32,308	367,009	330,012
50,000 - 99,999	35,113,345	17,997,360	4,673,461	306,709	144,621	437,019	703,107
25,000 - 49,999	46,140,603	23,361,371	6,331,966	649,968	97,201	413,263	968,933
10,000 - 24,999	41,066,372	18,043,406	3,833,797	306,179	123,399	809,332	713,170
Under 10,000	30,235,431	20,110,649	7,626,376	783,332	*	208,962	1,901,413

Metropolitan status and population of area served	Equipment: Binding and rebinding (9)	Equipment: Audiovisual (10)	Equipment: Other (11)	Plant operation and maintenance (12)	Capital outlay (13)	All other total expenditures (14)
All public libraries	$3,367,724	$3,340,636	$13,530,608	$106,900,304	$64,972,311	$115,607,118
500,000 and over	2,183,700	363,963	5,003,467	39,308,054	49,749,040	40,989,386
250,000 - 499,999	378,963	438,629	1,374,131	11,107,730	6,183,600	11,794,727
100,000 - 249,999	770,407	462,792	1,695,078	13,098,201	11,093,016	18,639,093
50,000 - 99,999	397,147	397,147	2,039,790	12,934,937	11,337,190	15,341,015
25,000 - 49,999	391,178	391,178	1,303,906	11,604,160	9,779,290	13,799,030
10,000 - 24,999	367,133	362,133	1,327,093	11,380,099	16,980,477	18,916,793
Under 10,000	231,073	321,690	1,206,366	8,685,030	14,990,964	5,489,110
Within SMSA Central	3,063,439	1,309,374	8,377,619	62,640,082	54,090,094	67,397,770
500,000 and over	2,063,071	637,737	5,300,056	37,130,080	43,303,730	39,300,131
250,000 - 499,999	380,913	260,437	1,041,007	9,115,904	3,133,712	9,300,682
100,000 - 249,999	490,363	199,485	997,187	9,773,780	1,773,164	9,871,376
50,000 - 99,999	240,425	149,097	647,166	7,299,437	3,974,807	3,117,924
25,000 - 49,999	83,297	62,473	710,716	1,664,778	381,433	2,640,642
10,000 - 24,999	42,020	21,034	80,276	777,147	1,460,461	1,373,390
Under 10,000	1,361	3,042	16,360	110,493	20,160	73,150
Within SMSA Other	1,239,430	906,770	4,019,178	29,779,351	30,840,473	31,303,040
500,000 and over	46,174	80,087	941,043	1,900,073	1,007,814	1,300,770
250,000 - 499,999	43,001	193,054	276,931	8,040,730	2,490,433	8,444,730
100,000 - 249,999	131,137	131,137	413,606	9,071,993	1,964,776	3,307,009
50,000 - 99,999	302,981	193,109	1,391,726	7,400,472	3,036,003	7,363,776
25,000 - 49,999	813,108	124,871	307,407	6,049,961	1,649,066	6,777,138
10,000 - 24,999	275,033	205,033	820,130	7,176,130	5,014,306	8,049,080
Under 10,000	80,105	80,105	376,990	3,312,193	2,300,341	8,187,349
Other than SMSA	975,729	499,990	3,063,977	19,307,070	37,307,080	17,793,000
100,000 - 249,999	66,340	116,804	803,000	1,045,037	1,404,073	1,300,086
50,000 - 99,999	140,601	316,390	1,034,640	2,365,097	4,304,177	3,110,006
25,000 - 49,999	130,427	184,362	399,828	3,041,420	7,613,177	4,137,017
10,000 - 24,999	123,399	123,399	460,330	3,432,043	9,461,002	3,307,443
Under 10,000	156,166	200,962	835,761	5,973,343	12,432,037	3,305,306

* Not calculated because of too few respondents in this category.

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TABLE 18.—PERCENT DISTRIBUTIONS OF PUBLIC LIBRARY EXPENDITURES, BY PURPOSE AND BY METROPOLITAN STATUS AND POPULATION: UNITED STATES, FISCAL YEAR ENDING IN 1976

METROPOLITAN STATUS AND POPULATION OF AREA SERVED	NUMBER OF LIBRARIES	SALARIES AND WAGES	PERCENT DISTRIBUTIONS OF EXPENDITURES, BY PURPOSE										
			SUPPLIES AND MATERIALS					EQUIPMENT			CAPITAL OUTLAY FOR SITES, BUILDINGS, ETC.	PLANT OPERATION AND MAINTENANCE	ALL OTHER EXPENDITURES
			BOOKS	PERIODICALS	MICROFORMS	AUDIO-VISUAL	OTHER	BINDING AND RE-BINDING	AUDIO-VISUAL	OTHER			
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)
ALL PUBLIC LIBRARIES	8,387	52.8	12.4	1.2	.2	1.0	1.4	.5	.3	1.4	8.5	9.6	16.3
500,000 AND OVER	50	54.9	10.7	1.1	.2	1.0	1.0	.6	.1	1.6	6.8	10.0	11.2
250,000 - 499,999	64	55.7	12.1	1.4	.3	1.7	1.3	.5	.4	1.2	5.4	9.7	10.3
100,000 - 249,999	220	56.9	12.3	1.2	.3	1.1	2.0	.5	.3	1.1	7.2	8.5	9.5
50,000 - 99,999	436	54.3	12.4	1.2	.3	1.3	1.9	.4	.4	1.9	7.6	8.8	10.4
25,000 - 49,999	740	52.2	14.7	1.4	.3	8.8	2.2	.2	.3	1.0	7.5	8.9	10.2
10,000 - 24,999	1,367	48.6	13.3	1.3	.3	.7	1.8	.3	.3	1.1	14.0	9.6	10.7
UNDER 10,000	5,430	41.0	10.8	1.5	.1	.4	2.4	.3	.4	1.3	18.4	10.8	7.8
PUBLIC LIBRARIES WITHIN SMSA, CENTRAL	611	59.0	11.2	1.2	.2	1.1	1.2	.9	.2	1.4	6.7	10.2	11.0
500,000 AND OVER	46	54.8	10.6	1.1	.2	1.0	.9	.6	.2	1.6	6.8	10.8	11.4
250,000 - 499,999	69	56.0	11.7	1.3	.3	1.7	1.3	.6	.3	1.2	4.3	10.5	10.7
100,000 - 249,999	133	55.5	11.7	1.2	.2	1.0	1.8	.5	.2	1.8	7.6	9.3	9.9
50,000 - 99,999	131	54.2	12.8	1.3	.4	1.2	2.3	.5	.3	.9	8.0	7.8	10.3
25,000 - 49,999	96	56.7	13.5	1.5	.3	1.0	1.6	.4	.3	1.3	2.6	8.1	12.7
10,000 - 24,999	92	47.0	12.6	.9	.3	.5	1.3	.4	.2	.8	13.9	9.3	12.9
UNDER 10,000	68	52.4	21.2	1.3	-	.8	4.7	.1	.4	1.3	1.6	9.4	6.8
PUBLIC LIBRARIES WITHIN SMSA OTHER	2,279	51.5	13.9	1.3	.2	1.1	2.1	.4	.3	1.3	6.1	9.7	10.2
500,000 AND OVER	4	54.0	12.8	1.2	.2	1.0	4.2	.2	.1	1.2	6.0	9.5	7.8
250,000 - 499,999	19	54.8	13.4	1.1	.2	1.8	1.2	.3	.7	1.0	9.0	7.4	8.9
100,000 - 249,999	50	58.1	13.0	1.3	.3	1.2	2.5	.4	.4	1.1	5.2	7.6	8.8
50,000 - 99,999	147	56.8	11.3	1.2	.2	1.3	1.4	.5	.3	2.8	4.7	8.8	11.4
25,000 - 49,999	297	54.8	15.4	1.4	.3	1.0	2.4	.4	.2	.8	2.6	10.8	9.9
10,000 - 24,999	587	48.7	13.8	1.3	.3	.8	1.9	.3	.3	1.2	8.8	10.5	12.1
UNDER 10,000	1,175	45.3	18.2	1.5	.1	.5	2.6	.3	.3	1.4	9.3	12.3	7.9
PUBLIC LIBRARIES OTHER THAN SMSA	5,417	44.8	13.8	1.4	.2	.8	2.8	.3	.5	1.7	18.4	7.9	8.2
500,000 AND OVER	NO RESPONDENTS IN THIS CATEGORY												
250,000 - 499,999	NO RESPONDENTS IN THIS CATEGORY												
100,000 - 249,999	37	53.9	14.3	1.1	.2	1.6	2.0	.4	.7	1.6	9.0	6.3	9.1
50,000 - 99,999	158	49.8	13.3	1.1	.4	1.3	2.0	.4	.9	3.0	12.3	6.5	8.9
25,000 - 49,999	347	46.6	14.2	1.4	.2	.9	2.1	.3	.4	1.3	16.5	6.7	9.4
10,000 - 24,999	688	43.1	12.5	1.4	.3	.5	1.7	.3	.3	1.1	22.6	8.2	7.9
UNDER 10,000	4,187	38.5	14.6	1.5	-	.4	2.3	.3	.4	1.6	23.8	10.8	4.5

TABLE 20.—SELECTED PERCENTILES AND MEAN TOTAL EXPENDITURES OF PUBLIC LIBRARIES, BY METROPOLITAN STATUS AND POPULATION: UNITED STATES, FISCAL YEAR ENDING IN 1976

METROPOLITAN STATUS AND POPULATION OF AREA SERVED	NUMBER OF LIBRARIES	TOTAL EXPENDITURES, PERCENTILES AND MEAN						
		AMOUNT	10TH	25TH	50TH (MEDIAN)	75TH	90TH	MEAN
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
ALL PUBLIC LIBRARIES	8,387	$1,113,944,880	$ 2,961	$ 6,889	$ 16,259	$ 37,144	$ 230,995	$ 134,049
500,000 AND OVER	20	343,995,411	2,257,999	3,618,030	5,005,356	7,485,447	11,066,885	7,279,380
250,000 - 499,999	44	114,512,947	263,798	952,343	1,449,338	2,539,879	3,137,882	1,784,259
100,000 - 249,999	220	154,897,422	179,020	336,585	611,241	986,764	2,348,785	700,443
50,000 - 99,999	436	149,436,713	76,156	138,113	270,416	436,874	748,347	342,763
25,000 - 49,999	748	130,398,345	42,873	73,997	129,126	248,218	379,123	174,283
10,000 - 24,999	1,367	128,717,196	13,419	31,823	59,149	104,002	159,083	88,309
UNDER 10,000	5,436	90,426,429	1,252	2,486	6,915	17,357	34,224	14,811
PUBLIC LIBRARIES WITHIN SMSA, CENTRAL	611	612,687,897	22,841	112,343	316,547	713,922	2,049,715	1,002,781
500,000 AND OVER	46	343,878,517	2,334,836	3,618,039	5,005,356	7,429,779	10,322,787	7,475,428
250,000 - 499,999	45	86,818,895	658,123	1,132,421	1,710,349	2,521,844	3,151,023	1,929,309
100,000 - 249,999	133	99,712,688	236,107	489,796	638,113	1,043,039	1,348,425	749,721
50,000 - 99,999	131	49,685,091	127,747	180,681	338,972	679,724	785,736	379,274
25,000 - 49,999	96 1/	28,824,345	-	-	-	-	-	-
10,000 - 24,999	92 1/	18,398,959	-	-	-	-	-	-
UNDER 10,000	68 1/	1,248,582	-	-	-	-	-	-
PUBLIC LIBRARIES WITHIN SMSA OTHER	2,279	308,859,396	4,886	21,985	61,270	123,356	321,252	135,524
500,000 AND OVER	4 1/	20,086,894	-	-	-	-	-	-
250,000 - 499,999	19 1/	27,693,782	-	-	-	-	-	-
100,000 - 249,999	90	37,784,145	168,218	374,984	674,841	1,001,996	1,388,288	755,683
50,000 - 99,999	147	84,596,277	92,814	193,226	337,005	688,373	864,825	439,428
25,000 - 49,999	297	63,625,617	68,782	106,369	183,802	311,036	392,888	213,453
10,000 - 24,999	587	58,344,365	27,248	45,857	77,534	148,396	247,856	116,430
UNDER 10,000	1,175	26,928,396	2,206	5,813	13,637	28,187	52,488	22,918
PUBLIC LIBRARIES OTHER THAN SMSA	5,417	191,998,368	1,268	2,704	8,924	29,178	83,185	35,444
500,000 AND OVER	NO RESPONDENTS IN THIS CATEGORY							
250,000 - 499,999	NO RESPONDENTS IN THIS CATEGORY							
100,000 - 249,999	37	16,600,589	159,848	197,298	296,396	579,935	890,577	448,649
50,000 - 99,999	158	35,155,345	56,196	103,483	155,887	287,221	418,978	222,501
25,000 - 49,999	247	44,148,683	26,836	51,549	92,308	163,985	272,725	132,978
10,000 - 24,999	688	41,886,372	8,089	21,377	41,331	78,276	186,359	60,852
UNDER 10,000	4,187	32,235,451	1,022	2,156	5,251	13,360	28,892	12,476

1/NOT CALCULATED BECAUSE OF TOO FEW RESPONDENTS IN THE SAMPLE IN THIS CATEGORY.

STATEMENT
OF THE
PHARMACEUTICAL MANUFACTURERS ASSOCIATION
BEFORE THE
NATIONAL COMMISSION ON NEW TECHNOLOGICAL
USES OF COPYRIGHTED WORKS (CONTU)
ON
THE DRAFT REPORT OF THE SUBCOMMITTEE
ON PHOTOCOPYING

APRIL 20, 1978

GOOD MORNING, MY NAME IS ROBERT D. FRAWLEY, I AM A STAFF ATTORNEY WITH THE PHARMACEUTICAL MANUFACTURERS ASSOCIATION. WE ARE A VOLUNTARY, NON-PROFIT ASSOCIATION COMPOSED OF 127 COMPANIES ENGAGED IN THE RESEARCH, DEVELOPMENT AND MANUFACTURE OF PRESCRIPTION DRUGS, MEDICAL DEVICES AND DIAGNOSTIC PRODUCTS. I AM APPEARING HERE TODAY NOT AS AN EXPERT IN COPYRIGHT LAW, BUT AS A REPRESENTATIVE OF PEOPLE WHO USE COPYRIGHTED WORKS.

MY PURPOSE IN BEING HERE IS TO TRY TO FOCUS THE ATTENTION OF THE COMMITTEE ON THE GENERAL UNCERTAINTY WHICH FACES USERS OF COPYRIGHTED MATERIALS, AND TO EXPRESS SUPPORT FOR THE BROAD-BASED STUDY OF THE EFFECTS OF THE ACT WHICH HAS BEEN PROPOSED IN THE DRAFT REPORT.

THE DEVELOPMENT OF NEW PHARMACEUTICALS IS A PROCESS IN WHICH THE PUBLIC HAS A DEFINITE INTEREST, AND THE FEDERAL GOVERNMENT HAS STRICT REQUIREMENTS REGARDING THE TYPE AND AMOUNT OF DATA WHICH WE MUST GENERATE TO SUPPORT THE SAFETY AND EFFICACY OF NEW HEALTH CARE PRODUCTS. OUR INDUSTRY, HOWEVER, IS NOT UNIQUE IN THIS REGARD. THE PUBLIC INTEREST IN PRODUCT DEVELOPMENT GROWS AS GOVERNMENT REGULATION EXTENDS TO MORE INDUSTRIES, AND MORE PRODUCTS ARE SUBJECTED TO INCREASED TESTING AND PRE-MARKETING CLEARANCE PROCEDURES. RESEARCH IS OBVIOUSLY A NECESSARY PART OF THIS DEVELOPMENT PROCESS, AND RESEARCH CANNOT SURVIVE WITHOUT THE RAPID DISSEMINATION OF NEW KNOWLEDGE.

BECAUSE THE DISSEMINATION OF INFORMATION INCLUDES THE USE OF COPYRIGHTED WORKS, RESEARCH-BASED INDUSTRIES HAVE A VITAL INTEREST IN THE NEW COPYRIGHT LAW. AS WE ARE ALL AWARE, MUCH HAS BEEN WRITTEN ABOUT THE NEW LAW BY VARIOUS GROUPS, AND MANY OF THESE WRITINGS HAVE BEEN INCONSISTENT, PARTICULARLY WITH REGARD TO SECTIONS 107 AND 108. PERSONS TRYING TO COMPLY WITH THE LAW ARE HAVING A DIFFICULT TIME.

IN DISCUSSING SECTION 107, FOR EXAMPLE, THE FOUR BROAD CRITERIA ARE SOMETIMES CITED AS AN EXCLUSIVE DEFINITION OF FAIR USE, WHEN THE ACT DOES NOT INTEND TO SO DEFINE OR DELIMIT THAT CONCEPT. FAIR USE, AS WE ALL KNOW, IS A FACTUAL QUESTION, TO BE DECIDED ON A CASE BY CASE BASIS. THE LEGISLATIVE HISTORY RECOGNIZED THAT THE DOCTRINE IS AN EQUITABLE ONE, BASED ON THE RULE OF REASON, AND THAT NO CLEAR DEFINITION HAS EVER EMERGED.

SECTION 108 ALSO PRESENTS SOME PROBLEMS WHICH ARE INCAPABLE OF EASY RESOLUTION. THE STATUS OF CORPORATE LIBRARIES AND INTERPRETATION OF THE PHRASE "DIRECT OR INDIRECT COMMERCIAL ADVANTAGE" ARE EXAMPLES OF ISSUES UPON WHICH THERE ARE DIVERGENT OPINIONS.

THE ASSOCIATION OF AMERICAN PUBLISHERS AND THE SPECIAL LIBRARY ASSOCIATION HAVE PUBLISHED GUIDELINES WHICH EMBODY DIFFERENT INTERPRETATIONS OF THIS PROVISION. EVEN THE LEGISLATIVE HISTORY OF THE ACT IS IN CONFLICT.

THE SENATE REPORT, FOR EXAMPLE, WOULD APPEAR TO REMOVE CORPORATE LIBRARIES FROM THE PROVISIONS OF § 108 ON GROUNDS

THAT COPIES MADE FOR CORPORATE EMPLOYEES WOULD BE FOR THE PURPOSE OF FURTHERING THE COMMERCIAL ENTERPRISE OF THE ORGANIZATION. YET THE HOUSE REPORT DEFINES "COMMERCIAL ADVANTAGE" AS PROFIT EARNED FROM THE SALE OF COPIES RATHER THAN PROFIT WHICH MAY EVENTUALLY RESULT FROM THE USE OF THE MATERIAL.

I CITE THESE INSTANCES ONLY AS EXAMPLES OF THE WIDE RANGE OF ISSUES WHICH REMAIN UNRESOLVED UNDER THE ACT.

IN VIEW OF THIS SITUATION, WE WOULD ASK THE COMMISSION TO RECONSIDER A STATEMENT MADE ON PAGE 89 OF THE DRAFT REPORT, WHICH SAYS:

> "THE 1976 ACT AND THE LEGISLATIVE HISTORY INCLUDING THE EDUCATIONAL COPYING, MUSIC COPYING AND CONTU GUIDELINES PROVIDES FAIRLY CLEAR GUIDANCE TO EDUCATIONAL INSTITUTIONS, LIBRARIES AND ARCHIVES ENGAGED IN COPYING AND INDIVIDUALS REQUESTING COPYING FROM THESE INSTITUTIONS."

WE REALIZE THAT CONTU HAS PUBLISHED GUIDELINES WHICH DO GIVE GUIDANCE TO SOME GROUPS, BUT WE THINK THAT THIS GENERAL STATEMENT, USED AS IT IS IN INTRODUCING AN AMENDMENT TO THE ACT, COULD GIVE THE IMPRESSION THAT USERS OF COPYRIGHTED WORKS SHOULD HAVE NO PROBLEMS UNDER THE PHOTOCOPYING PROVISIONS EXCEPT FOR THE ONE ADDRESSED IN THE PROPOSED AMENDMENT.

We suggest that the statement be modified to refer only to those groups for whose benefit the guidelines have been issued. We would further suggest that the Commission highlight some of the conflicting interpretations that exist under Sections 107 and 108, when discussing the study required by Section 108 (i).

We think it would be appropriate for the Commission to urge the Register of Copyrights to actively seek the views of users of copyrighted materials. The Register of Copyrights should be encouraged to initiate contact with researchers, medical and scientific investigators and businesses in the conduct of their study.

The draft report on photocopying is an impressive undertaking. The final report will undoubtedly be considered an authoritative source of information on the new copyright law.

We therefore believe that it is important that CONTU discuss the uncertainty caused by Sections 107 and 108, and that the Copyright Office be encouraged to consider these problems in the study mandated by Section 108 (i).

This concludes my formal presentation, I will be happy to answer any questions which the Committee may have.

STATEMENT

OF

PAUL G. ZURKOWSKI

PRESIDENT, INFORMATION INDUSTRY ASSOCIATION

BEFORE THE

NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS

WASHINGTON, D.C.

APRIL 20, 1978

My name is Paul G. Zurkowski. I am President of the Information Industry Association We appreciate the continuing opportunity to share our views with you and particularly for this opportunity to discuss the Photocopying Subcommittee Report.

Standing back from the report, assessing its features and segments, our Committee noted two major aspects it wished to comment on. Comments on specific sections will be made within the context of our discussion of these two aspects.

I

The first arose out of our discussion of the question "Just what is the interest of the information industry in this report?" The committee discussion led to a consensus that while the report addresses the photocopy relationship between producers and distributors of journal and other inkprint materials,[1] it does not address photocopying in the larger context of the total information marketplace.

By omitting consideration of certain relationships between producers, distributors, and retailers, the report suggests several interpretations of the current situation which we feel will prejudice the healthy growth and development of the complete information structure needed by this nation.

This, in turn, will seriously and adversely affect the ability of the public to gain access to copyrighted works in ways and on terms suited to their individual preferences.

Information in its myriad forms is gradually being recognized and dealt with as an economic good. For many segments of our population, such treatment simplifies, regularizes and facilitates its effective production, distribution, retailing, and accessibility. Your authorization clearly reaches consideration of the total information apparatus by which the public gains access to copyrighted materials. Copyright, particularly under new copyright law, provides the rules governing these

1/ The footnote on page 1 about microforms is a little confusing since it mixes up creating a microfilm master (a production or manufacturing function done under manufacturing conditions) with photocopies or the making of copies from microfilm masters (a distributor function).

relationships and as such they deserve fair and equitable treatment in this report.

The report makes a good start in that direction in its discussion of the competitive effect of the National Periodicals Center. (Certainly its discussion of the relationship of library photocopying and the economics of journal publishing is of critical importance. We feel there are equally important other relationships needing similar treatment.) We commend the report for its recognition that if the pricing scale of the Center results in its being given a monopolistic position, public access to materials would be adversely affected. The number and variety of fulfillment sources would be reduced. Competition between such services is essential to the constant improvement and development of services to the public. No single source can hope to serve the infinite variety of "cognition screens" found in society. Only by healthy competition can users with common requirements, perspectives and cognition patterns, or what Curtis Benjamin has labeled "the Twigs," be sorted out, identified, addressed and served adequately.

The report then goes on to treat several other matters without similar regard for the effect on competition within the information apparatus of the country.

The proposed new section 107(b) is a recommendation that should be analyzed more closely from the viewpoint of this effect on competition between document fulfillment services in libraries, in college and university copying centers and in the information on-demand companies all providing "retail" access to photocopies of copyrighted materials.

What is the competitive effect of different "fair use" standards"? Would the "much more limited" fair use privileges of organizations in the business of making copies debase the currency of their services and adversely affect their competitive positions vis-a-vis similar library based services? Why does it matter who makes the copy if it is a single, unrelated copy made for purposes set forth in the fair use section? What alternative approaches are possible?

A second example is the treatment of a library system as a single library for interlibrary loan purposes. Aside from the questions of whether or not that interpretation of the law is sound and of what affect alternative interpreations would have on the relationships between such libraries and publishers, what is the competitive effect of

such a theory on the services offered by commerical "retailers" which such libraries compete?

A third example is the recommendation to the Register of Copyrights with regard to her data collection efforts. Clearly, under the new law data gathering on photocopying practices will be more difficult than it was under the old law, for two reasons:

First, the new law is in effect and there is no apparent "grace period" for photocopying practices which, under the new law, are clearly infringements. Everyone is likely to be a great deal more taciturn.

Secondly, the report's statement about the photocopying practices of "information on-demand" companies is not accurate and is unfair and prejudicial to these firms. Contrary to the report's language, many of these firms had authorizations for copying and had made specific arrangements for payment to copyright owners. Several of these firms provided the Commission full cooperation in its inquiry in keeping with the recommendations we made to them. Are they likely to remain cooperative when such treatment results?

They recognize that to build a solid foundation for the growth of their business, the need for which is more clearly evident every day, they must come to satisfactory arrangements with copyright owners. Their full cooperation with this Commission is concrete evidence of their good faith.

While it does jeopardize their future willingness to cooperate in data gathering activities, it does raise a key point which otherwise might have been overlooked.

Your report should make recommendations that provision be made for the Register to receive photocopying reports in confidence and to report them to the public as general, broad-based statistics. in the absence of such arrangements, common to all statistical gathering involving proprietary data, the problems in obtaining meaningful statistics will be severe.

A fourth example of the insights to be gained by viewing photocpying in the context of the manufacture, distribution and retail economic functions relates to the section of the effects of future technological change, a section which we found basically sound,

incidentally. It highlights the relationship of distributor and retailer.

Without addressing the data base questions, the subject of another subcommittee of this Commission, it would be helpful to the community if the Commission were to specifically address the issue of the machine reproduction of segments of data bases.

The bibliography developed as the result of a detailed search of a data base is frequently "bled off" from the mother computer and stored in a minicomputer. From there it can be printed out repeatedly with every appearance of having been printed out from the mother computer but without payment to the data base producer or distributor. This is comparable to photocopying of inkprint materials. The duplication of the print-out by photocopy or photo-offset, is the equivalent of multiple copy photocopying.

While the law may not need amendment on this point, a clear statement from the Commission would be helpful in making it clear that the law applies equally to all kinds of machine reproduction.

(We cannot restrain ourselves from responding to the Subcommittee suggestion that because these activities can be controlled by contract that somehow this is an answer to the problem. What is missing in this approach is the national uniformity and simplicity that marks the copyright approach; and what is, unfortunately, omnipresent in such an over-emphasis on the contract approach is the "gray area" of antitrust-law uncertainty -- an uncertainty which is frequently a consequence of such excessive reliance on the contract approach.)

It is our feeling that a fuller statement by the Commission is called for relating more completely to the complex of relationships controlled by copyright in the information marketplace. We stand ready to assist in this matter in any way.

II.

The second point identified by our committee was quite stunning.

If you asked anyone involved in the day-to-day problems arising out of the new copyright law, from the librarian receiving and handling requests for photocopies to government agencies and private companies seeking to work within the law, what their biggest problem is, what would they say?

"How do we distinguish between fair use and systematic photocopying?" would be their unanimous question.

The report fails to address this question in a meaningful way. We aren't sure what the answer is, although we will make some suggestions below, but we strongly believe the development of the answer is an iterative process requiring each of us to take a stab at it and by doing so to advance the discussion, the understanding and the narrowing of the complex issues involved.

We think the discussion of this question has gone about as far as it can go looking at the question from the perspective of the person requesting the copy. As this report illustrates, it is difficult to single out a particular photocopying agency for special treatment.

The answer lies not merely in who asks, for what purpose or who makes the copy, but also in whether that copy is part of a systematic photocopying practice or is republishing of the original material.

If a photocopying agency, regardless of its tax status, or its commercial or non-commercial purpose, engages in systematic photocopying, its behavior overrides the behavior of the person requesting the copy. That's one of the things the law seems to say in distinguishing between fair use and systematic photocopying. Certainly, an individual for his own information will not be able to engage in systematic photocopying for very long. It must be the suppliers' behavior which is controlling.

Commercial firms or libraries organized to provide and promote the availability of photocopies on demand, whatever the service is called, are offering to republish their holdings or other materials to which they have ready access. They seek to achieve an economy of scale in the provision of this service much as publishers do. To do otherwise is uneconomic and will not support such an organized effort or such promotion campaigns.

The assertion in the report that copying of single-page articles is not an infringement will be hotly contested. What about abstract journals? How about trade publications or weekly news magazines? What about daily newspapers? The question isn't whether a single page is fair use. There are many other tests which must apply. Is the supplier engaged in systematic photocopying? Is the single page an entire article?

Does the single page contain a graph displaying the essential "guts" of the entire copyrighted item?

The commission should report statistics on the contra-assumption that photocopying single-page articles constitutes infringement. Otherwise, your statistical base is subject to question.

The single library concept relied on by the report also is subject to challenge on the basis of "systematic" photocopying questions. At what point does such a "library" begin to engage in systematic photocopying? When one subscription services 5 branches, 25 branches, or 100 branches? These factors are relevant and need to be addressed.

It is clear such a system cannot have it both ways.

It cannot photocopy more than 5 copies from a single journal anywhere in the system.

It cannot escape the "systematic" nature of its activities merely by taking out a single subscription.

Our committee urged that we make every effort possible to make it clear how important it is for this commission to move the dialog on photocopying toward a resolution of the major outstanding controversy over fair use and systematic photocopying.

It further urged that the Commission direct its attention to a balancing of the behavior of the requester and that of the supplier. At the moment the whole discussion is contentrating too heavily on the behavior of the requester. The law suggest otherwise, in our opinion.

Re-publishers need copyright permission regardless of the uses to which their copies are put. This is true regardless of the tax status or the social or economic motivation of the supplier.

In summary, let me restate our two major concerns:

First, there are many relationships in the information marketplace which need to be addressed in the same detail as the library-publisher relations have been.

Second, we respectfully urge the Commission to address in as comprehensive a way as possible the issue of systematic photocopying.

The community at large is looking to the CONTU process for guidance and leadership in resolving this central issue.

Council of National Library Associations, Inc.

Committee on Copyright Law Practice and Implementation

Founded: 1942

A Statement Submitted to

The Commission on New Technological Uses of Copyrighted Works

concerning

The Draft Report of the Subcommittee on Photocopying

April 20, 1978

TABLE OF CONTENTS

The library community of the United States is pleased to have the opportunity to comment on the Draft Report of the Subcommittee on Photocopying of the Commission on New Technological Uses of Copyrighted Works.

1. Recommendations in Draft Report (p.84-97; Part VII)

The members of the CNLA* Committee on Copyright Law Practice and Implementation wish to comment favorably on the Recommendations in the Subcommittee's Draft Report.

In particular, we wish to record our concurrence with the statements:

> "There can be no directly applicable evidence without some experience with the new law, now only a few months in effect." (p.84)
>
> "The Copyright Office is the appropriate body to review and assess photocopying practices for the first five year report under the new law." (p.87)

1.1. Proposed Section 107(b) (p.89-90)

We are in sympathy with the objectives of the Proposed Section 107(b) regarding "commercial copiers". However, we are concerned that the proposed wording of the last sentence of the Proposed Section 107(b)(1):

> "However, the privilege of individual customers to make fair use of copyrighted works under terms of Section 107(a) does not necessarily

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*Council of National Library Associations

> extend to commercial copiers who supply the individuals with copies or phonorecords."

may limit rights now granted by Public Law 94-553. We recommend that a sentence be added to the Proposed Section 107(b):

> "In no way does Section 107(b) affect the subsisting rights in Public Law 94-553."

1.2. Mechanism for Data Collection for Five-Year Review (p.92)

Part VIII-D(3) suggests that library surveys conducted by the National Center for Education Statistics be used to collect photocopying data. We suggest that an organization (such as King Research, Inc. or a similarly qualified organization) be employed as a contractor for statistical data collection rather than NCES.

A base line has been established by the King Study*. Future data collecting activities should parallel as closely as possible the King Statistical sample which has established a base line; thus comparisons that are meaningful and timely** can be attained.

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* "Library Photocopying in the United States". Oct 1977 Supt. Docs. No. 052-003-00443-7.

** It has been noted that two, three or more years elapse between the collection of data by NCES and publication of the data.

2. Extrapolated Estimates and Interpretations (p.16-28; p.60-68)

We are concerned that the Draft Report presents interpolations and extrapolations of the King Research data without adequate evidence as to the validity of such manipulations. Interpretations that are not in the King Report itself are open to challenge and should not appear in the Final Report.

Further, it is unfortunate that the Draft Report contains admitted "arbitrary estimates" (p.21) such as that relating to

> "...items photocopied for users in libraries in for-profit organizations to take into account that portion of these libraries which are not eligible for the benefits of Section 108(d) because they do not choose to be open to the public or specialized researchers. If one makes an arbitrary estimate that about one-half of these 4,260,000 single copies are made in such special libraries,..." (p.21) [Emphasis added]

We question the validity of the assumption of "an average copying fee per article of $1.25" (p.60) and the overall additional costs to libraries derived therefrom.

The statement concerning libraries in business and industrial establishments that

> "...information is used for purposes of increasing the revenues or reducing the costs of the business, and copying fees would be a tax-deductible cost of doing business like all other such expenditures."

combines an inaccurate assumption of the functions of such libraries with an unfortunate assumption that a tax deduction would necessarily offset the costs of the copying fees.

We respectfully urge the Commission that all numerical manipulations of existing data and arbitrary estimates and assumptions be omitted from the Commission's Final Report.

3. Copyright Status Records (p.28-29)

The Draft Report notes correctly that

> "there is no satisfactorily simple and inexpensive method of determining whether these older issues are still under copyright."

However the suggestion in Part III-B2(c) that the CONSER project include copyright status in its computerized data base overlooks the multitude of copyright registration dates for issues of any one periodical. There are 12 registration dates each year for a monthly periodical, and 52 registration dates for a weekly. It is also quite probable that the first or last issue in a calendar year may have been registered in a preceding or succeeding calendar year. All problems relating to periodicals have a greater order of magnitude than similar problems relating to monographs.

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4. "Analytical Comments" on Statistical Margins of Error (p.66)

The Subcommittee has invited comments on the ±30% margin of error at a 95% confidence level in the King Study for copying in public libraries. The universe of public libraries included in the study has a broad spectrum of public libraries of different sizes in geographical regions with widely divergent community interests. One may well expect that any universe of public libraries will represent greater differences in the interests of the users than the universes of any other types of library. Therefore it is not unexpected that such an apparent margin of error is found.

5. National Periodicals Center (p.37-45; Part III-D)

We commend the conclusions of Part III-D on the National Periodicals Center that the 1976 Act not be amended in relation to such a potential center and that the Register of Copyrights and the appropriate Congressional Committees follow the evolution of plans for the Center.

However, we recommend that Part III-D be revised so that it is based on factual information as presently known, and that the lengthy speculations in p.39-44 be eliminated. The Draft Report clearly states that the recommendations of

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the Technical Development Plan being prepared by the Council on Library Resources for a National Periodicals Center are unknown. We believe it is inappropriate and unwise if the Final Report of CONTU speculates on how such a Center might operate; how it might compete with for-profit organizations; why it might not be eligible as a "library" under the Copyright Law; what kinds of agreements with publishers it might make; and how some of these agreements might be discriminatory and in violation of the Robinson/ Patman Act.

The speculations in the Draft Report, in addition to being potentially inaccurate and unfair, may also have a chilling effect on the free, creative and cooperative enterprise and negotiations which will be needed in the planning and implementation of a National Periodicals Center.

6. Conclusion

We feel that it is appropriate to repeat a paragraph from the Conclusion of our statement of Oct 21, 1977 (p.24):

> "With the experiences to be gained during the next five years with this new legislation, all parties concerned will be better able to fully assess the impact of the new law on their individual goals and on their common goals to provide all users of copyrighted works with ready and reasonable access to information."

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The CNLA Committee commends the CONTU Subcommittee on Photocopying for the Recommendations in the Draft Report. But we recommend a clarification of the proposed Section 107(b) so that the new section will not affect subsisting rights in Public Law 94-553. We respectfully urge that manipulation of existing data and arbitrary estimates and assumptions be omitted from the Final Report.

We appreciate the continued interests and activities of the members of the Commission; and we are pleased to have this second opportunity to express our views to the members of the Commission.

Julius J. Marke
American Association of Law Libraries

Edward G. Holley
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John G. Lorenz
Association of Research Libraries

Nina C. Matheson
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Susan Sommer
Music Library Association

F. E. McKenna
Special Libraries Association
Chairman, CNLA Committee on
Copyright Law Practice and
Implementation

Appendix A. Errata Noted in Draft Report

Three typographical errors have been noted in the Draft Report. They are:

p.5, line 21	Section 108 should read Section 107
p.38, line 12	January 1977 should read January 1978
p.97, line 6	Part III-E should read Part III-D